# FOREST LAW.

*A COURSE OF LECTURES*

ON THE

PRINCIPLES OF CIVIL AND CRIMINAL LAW

AND ON THE

LAW OF THE FOREST.

*(CHIEFLY BASED ON THE LAWS IN FORCE IN BRITISH INDIA.)*

Addressed to the Forest Students at the Royal College of Engineering, Coopers' Hill.

BY

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# PREFACE.

A FEW words are necessary to explain that the present work is intended to replace my "Manual of Forest Jurisprudence," published for the Government of India in 1882, and now out of print. Ten years have moreover passed away, and consequently the work needed to be brought up to date, to say nothing of its receiving improvements in arrangement and matter. I have decided to omit the sketch of Indian Civil Procedure, and the Stamp and Registration Laws. In its present form, it is hoped that Forest Officers (in India especially) will find the work more easy to refer to than its predecessor. I have only to add that these Lectures are not published with any official *imprimatur* whatever.

B. H. BADEN-POWELL.

OXFORD, 1893.

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# ABBREVIATIONS.

The following works frequently quoted are referred to by short titles to save space :—

| QUOTED AS | FULL TITLE. |
|---|---|
| *Ang.-Ind. Codes* | The Anglo-Indian Codes, 2 vols., edited by Whitley Stokes, D.C.L. (2 vols., with a series of supplements). Oxford: Clarendon Press, 1887. |
| *Code Forestier* | Code Forestier, avec exposé des motifs, sous la direction de M. Le Baron F. de Langlade. Paris: Ch. Béchet, 1827. And in a pocket volume—"Code de la Législation Forestière." A. Puton. Paris: J. Rothschild, 1883. |
| *Curasson* | Le Code Forestier, conféré et mis en rapport avec la Législation, &c., 2 vols. Paris, 1828. |
| *Cooke* | Cooke's Wingrove on Enclosures, 4th ed. London, 1864. (No later edition has appeared.) |
| *Dalloz et Meaume* | Articles, "Usage"—"Usage Forestier," reprinted (Nancy, 1861) from the Répertoire de Législation. |
| *Danckelmann* | Die Ablosung und Regelung der Waldgrundgerechtigkeiten. Dr. Jur. B. Danckelmann (2 vols., with a vol. of Tables). Berlin: J. Sprenger, 1888. |
| *Eding* | Die Rechts Verhältnisse des Waldes (Berlin, 1874). |
| *Ganghofer* | Das Forstgesetz fur das Konigreich Bayern. Nordlingen, 1889. (The revised law of 1879.) |
| *Grabner* | Die Forstwirthschaftslehre. Vienna: Wessely, 1866, 3rd ed. |
| *'Kánara Case'; The* | Bhiskarápa *versus* the Collector of Kánara; Indian Law Reports, Bombay series, Vol. III., pp. 452-785. |
| *Manwood* | A Treatise of the Laws of the Forest, &c., collected as well out of the Common Laws and Statutes of this Land; as also out of sundry learned ancient Authors and out of the Assises of Pickering and Lancaster (first published about 1598) 3rd ed., London, 1665. |
| *Markby* | (Sir W.), Elements of Law. Clarendon Press: Oxford, 1889. |
| *Meaume* | Des droits d'usage dans les Forêts. (Commentary on the Code. Tit. III., sec. 8.) 2 vols. Paris: A. Durand, 1851. |

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| *Olshausen* . | . Dr. Justus: Grundriss zu rechtswissenschaftlichen Vorlesungen, 2 vols. Berlin, 1889. (Text book of the Eberswalde Forest School.) |
| *Pfeil* . . | . Anleitung zur Ablosung der Waldservituten, 3rd ed. Berlin, 1854. |
| *Puton* . . | . Manuel de Législation Forestière (Paris: A. Coin, 1876). (Manual of the Nancy Forest School.) |
| *Qvenzel* . . | . Rechtskunde fur Forstbeamte in Konigreiche Sachsen, &c., with Supplement. Dresden (undated). |
| *Roth* . . | . Handbuch des Forstrechts. Munchen, 1863. (See *Ganghofer*.) |
| *von Berg* . | . Die Staats-Forstwirthschaftslehre. Leipzig, 1850. |
| *Williams* . | . (Joshua, Q.C.) Rights of Common and other Prescriptive Rights. London, 1880. |

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# LECTURES ON FOREST LAW.

## PART I.

ELEMENTARY NOTIONS OF THE CIVIL (PRIVATE) LAW.
THE LAW OF PERSONS AND THINGS.

### LECTURE I.

INTRODUCTORY.

THE STUDY OF LAW IN RELATION TO FOREST EDUCATION.

On commencing this course of lectures, it will be desirable to offer some introductory remarks, explaining how the subject of law which we are now to deal with, stands in relation to the general study of "Forestry." Hitherto you have been regarding forest-lands in the light both of a natural feature in the organization of the earth's surface, and in that of an agency for the production of a certain class of materials. You have considered that forests are a necessity for the physical well-being of most countries, almost as much as rivers, mountains, and seas, or any other natural features, are. You have also considered that Forests constitute a storehouse, or rather a growing stock, of materials which are practically indispensable to human welfare, and of a kind for which no complete substitute can be found. The *major* products are timber for building and wood for industries and for fuel; the *minor* (or accessory) products are of many kinds, gums, resins, pitch, wood-oil, bark, dye-stuffs, tans and fibres, leaves, moss, and sometimes the dead leaves and humus. You have also considered that from the point of view of this

direct utility, it is necessary to preserve, manage properly, and cultivate, forests; for otherwise they will—perhaps in a long time, but surely—deteriorate and cease to be of use; or at any rate will become of much less use, being inferior and degraded in their produce. It has also been an important branch of your study to observe how you can vary the treatment of forests so as to develop the production of the sort of material you want; or in other words, so as best to attain to different objects which the public interest may demand. You have also learned something of the "economy" of forest management,—noting how the forest is a peculiar kind of producing-agency; it differs for instance from an orchard, which, though consisting of a number of trees, is yet destined only to yield fruit gathered from the branches year by year: it differs from a field of wheat or turnips where the entire area is stocked at once by a single operation, and the produce realized over the whole area at once, also by a single operation. A forest as it stands growing, is a permanent source of profit, and has to be regarded as a "stock" or capital, to be maintained, and indeed increased and improved, and to be handed on from one generation to another, while only its annual increase—the interest or profit of the capital—is utilized. But when you look on the portions of a country devoted to "Forest," in whatever form or fashion, and note that large returns are obtained either of useful material or in money, you are led naturally to remember that whatever areas are capable of *yielding value*, are sure to be appropriated, and more or less jealously guarded, by *some* one—either by individuals or by the State itself. They cease to be regarded as the air or open sea,—as merely natural objects free to the world at large; they become "Estates" or *pieces of property* of a certain kind.

### *Forests as property or estates.*

There are still, in some parts of the world, enormous areas where forests have not yet become "property." The vast forests of Central Africa, may contain what would, if it were in India or in Germany, be untold wealth; where it is, this great stock of material is of no present use to any one. And if any tribes are found on the borders of such a forest tract, every one

will probably be at liberty to appropriate it, or clear and cultivate as his own, any bit of land he likes.

A similar state of things has existed in most countries in the distant past; but it gradually ceased, only leaving behind it a sort of lingering feeling in the minds of the ignorant—still experienced, by the way—that forests are somehow free to any one to do what he likes in or with. But as society now exists, in every civilized, fully populated, and well-governed country, nearly the whole surface of the land is of *some* value, and has accordingly been "appropriated," either by individuals, or bodies, or by the Crown, or by the public regarded as a corporate or united owner. Even where there are large areas of barren waste, moor, or marsh-land, and these, perhaps, are neither enclosed nor put to any definite use, still, they are no longer regarded as "no man's goods," to be seized and held by the first comer at will; they are recognized as the "property" of the Crown, the State, or the nation; and can only be dealt with in a specified way—a way which in time becomes prescribed by law. In India, for example, British rule commenced (A.D. 1765—1772) in Bengal, and it is said that in those days as much as one-half of this now populous province was covered with jungle, uncultivated and unappropriated. At first, for some years, the Government took no notice of the waste which adjoined already occupied estates: people seized on it, and encroached, and settled on it as they pleased. As late as the year 1819, the law still took no notice of the *right of property* over such waste; only then it began to think of making the new occupiers pay the contribution to the State called land-revenue: and it was not till 1828 that the law (by Regulation III., still unrepealed) declared (what had always been the law or custom), *viz.*, that "waste" land was Government property, and could not be seized upon at pleasure. Gradually the Government realized the value of its waste lands; and "rules" began to be made for their disposal, by lease or sale to intending cultivators. But still a long time elapsed before the Government of India conceived the idea of definitely setting apart large areas of such land to form village and public or State forests.

In older nationalities, the surface of the country became much earlier appropriated, and is now completely divided up into

"properties." At the present day the area of any civilized State may be likened to a chess-board, on which the different squares represent so many "pieces of property." Indeed, if you took a large scale map (such as we call a *cadastral* map) of any European district, and coloured separately each "estate" or piece of property according to its nature, or the kind of owner it had, you would find that the whole map would present a patchwork of many colours; here a block of private agricultural land, next a moor appropriated to the Crown; next an estate belonging to a university, a school, or a hospital; next an estate belonging to a commune, or to an association of some kind, next a churchyard or a cemetery, also regarded as a property, though not of any individual. Next there might be a forest belonging to some great land owner; next a smaller wood belonging to a private owner, and indicating his circumstances by the fact that it is only a coppice wood or worked by some form of "petite culture;" lastly, perhaps in a less populous part, along a great mountain range, there will be a vast tract of timber forest held by the State. Hence we are able to consider forests in a new light; we regard them as *pieces of property*, as "estates" of a peculiar kind, and (as we shall see later on) having special characteristics.

This is not only a matter of words: it is an important and most practical conception. Failure to grasp it in our colonies, and in other countries too, has been the cause why so little progress has been made in putting forest conservancy on a rational basis. For if you realize the idea of a forest estate to be cared for as a piece of property and protected by law, you will also acknowledge that a "piece of property," if it is to be either managed or protected, must be defined as to its limits, and all questions of right and obligation arising within those limits must be settled.[1] If that is not done, the forest is still

[1] No practical conservancy of forests, such as the economic conditions of an entire country demands, can ever be effected without the definite constitution of compact public estates, large enough to be thoroughly manageable with reference to all sorts of economic conditions—production of timber and provision for grazing and other useful rights of user. It is sometimes supposed that the wholesale destruction or cutting away, by lumbermen, of the natural forest, can be sufficiently compensated for by encouraging the plantation of individual trees, or of small groves or woods (on such odd bits of land as ordinary farmers can spare for the purpose) all over the State or country. Even if the future of such plantations could be for ever insured, the utmost result obtainable would be the greater amenity or pleasantness of the locality. Nothing would be done economically for the *national timber supply;* because the trees at best are so scat-

in a fluid, uncrystallized state; it hardly deserves to be called "property," and in consequence any real conservancy will be unattainable. And it will at once occur to you, that if forest and other estates are to be recognized as *pieces of property* in the above sense, the recognition can only be made practical and operative by some action on the part of the national legislature or central authority, whereby, the State, the person, or body (as the case may be), who has become the owner, is protected in his enjoyment within certain local limits, and other persons are prevented from wrongful interference. Law is the declaration of the nation (through its sovereign, its constituted parliament, or other legislative authority) that certain things are, or are not, to be done; and this declaration is enforced—to put it very broadly—by the public authority making things unpleasant for the party who disobeys or fails to acknowledge the rights and obligations declared. The provision of the disagreeable consequence, whatever it is, whether to pay damages, or suffer imprisonment, or pay a fine, is what gives effect to the law, and is called its "*sanction*;" or, to put the whole matter in other words, law declares or recognises, that some persons have the *right* to appropriate things or become their owner; and other persons have the corresponding *obligation* to respect the right and to abstain from acts of interference, the law threatening some remedy, or some punishment, in case of disobedience.

We have then to study law as creating or recognising *rights* and *obligations*; and as constituting *property* by declaring certain rights to exist in a person (called the owner), and possibly also other rights, existing in favour of other persons, not being ownership rights. In each case the law enforces the declaration by imposing penalties or liabilities on persons infringing its terms.

Now Forest officers are the managers and controllers of forest estates; and as such they enter into various relations with the public, and with individuals. They require to know something of the principles on which the right of property is based, and about rights of user; something about their own legal

tered, that in endeavouring to realise any considerable amount of wood, it would be necessary to glean single trees over an enormous extent of country: and this would be very costly. This, however, is only *one* of the objections, by way of illustration.

duties and their position as public officers; and something about the principles which regulate their contract relations with workmen, buyers of forest produce, and others. We have to keep our study, however, within the narrowest limits possible, because forest officers are not lawyers: a knowledge of law is not their primary requisite, but only a secondary or subsidiary one.

### *The basis of law.*

In law, as in every other science or art, we begin with certain very simple and elementary conceptions. Science is, after all, only common knowledge systematized and arranged. It always starts from the simplest facts of observation and experience, and places those facts in a right relation one to the other; it then proceeds from simple to more complex relations; and gradually we are able to advance to the connection of whole sets of such relations to other whole sets. So it is in law. We commence accordingly with a very simple and obvious fact. The world around us—that with which our bodily life is directly concerned—obviously consists of two broad classes of constituent objects, the PERSONS or human beings in it; and the THINGS in it—the soil, trees, and articles generally, whether artificially made or natural, and whether they are fixed or can be moved from hand to hand. Animals are regarded as *things*, because they have not the characteristics of persons, *i.e.* (as we shall afterwards see), they do not possess rights, except in a secondary sense, as when we prohibit cruelty to animals by law. And then the *persons* stand in some relation to the *things*: for the soil and other objects are mostly of use; some of them are absolutely necessary to human livelihood. Consequently, at an early stage, some form of *appropriation* of things or different parts of things, began to be recognised.

How this idea of appropriation and ownership grew up and advanced to its modern form, we do not now enquire; that is a matter for the historical jurist to trace out; and a very interesting study it is: but we cannot concern ourselves with it here. It may be permitted to remark, however, that the idea of individual permanent appropriation is one that only has slowly grown into its modern form. The idea is at first most readily

accepted with regard to moveable articles, especially those which are made by the exercise of individual skill, labour, and thought. In early historic or pre-historic times, a tree in a forest was probably regarded as no more the subject of property than the air or the sea; but if a man cut a bit of wood and fashioned it into a cup or a platter, it soon came to be felt that he had some particular claim to the finished article, which his fellows had not. And in the course of time, the same thing would happen when bits of land were laboriously cleared or made into fields. So it has come to pass that as the relations of men widened and the wants of more civilized life increased, nearly everything that, by nature, is capable of appropriation, has been appropriated; and in our own times it is looked on as quite a natural condition—a matter of course—that "everything should have an owner."

But how is this sentiment that one person has a special claim to any object, or to a piece of land, given effect to? In the course of time there is always some king or council of elders, or other central authority, which, at first fitfully and perhaps tyrannically, but afterwards in a more regular way, gives effect to or enforces the general sentiment. In the end, rights of property become formally established and enforced by the power of the State. To put it shortly, the way in which the central authority gives effect to the sentiment of ownership, is (as already stated) by acknowledging that the person we will now call owner, has a *right* to the thing he owns, which others have not: and if one has a *right*, some others or all others (as the case may require) have a corresponding *duty* or *obligation* not to interfere with that right.

But it is not only in the case of *persons* and the *things* around them, that this question of *right* on one side and *obligation* on the other, arises. For "persons," at any rate where they live in a tolerably civilized society and form a nation, also stand in some definite relation to one another, and to the whole body. In the first place, a person has certain *rights* in virtue of his mere being and birth. He is recognized as having a right to his personal freedom, and to safety from being killed and robbed and injured; he has a right to his good name and character; and to a certain station in life, as a citizen, a prince, a peer of

the realm, etc. A corresponding *obligation* lies on all other persons, not to infringe the right. Again, as a citizen or member of the State, he has both *obligations* and *rights* as well; he has a *right* to call the public authority to his help if he is wronged: he has a *right* (however regulated by law) to a vote concerning the representation of his town, county, etc., in the different legislative assemblies or Local Government Boards; he is *obliged* to pay taxes, and to do various things required for the general convenience. He is required to abstain from various acts that threaten or destroy public peace and security, and if he fails in this respect, the law will *punish* him, as an offender against the community at large.

Then again, persons stand in a *natural* relation to each other in the family, as parent and child, husband and wife; guardian and ward: and here other rights and obligations arise. And lastly, a vast variety of relations between persons, do not exist naturally, but are called into existence *by some voluntary act* on the part of either of them; and here again the result of such action is to create a right on one side, and an obligation on the other. Very often, too, the occurrence of some *involuntary event*, or some *wrong-doing* on either side, gives rise to rights on one side and obligations on the other.

You will observe that not only is there always an obligation corresponding to a right (for you cannot have a *right* without someone also being *obliged* to respect it); but also these rights and obligations are (when they arise out of human dealings) in many cases *reciprocal*, *i.e.*, not only does one person have a right and the other an obligation, but *vice versâ*, the person who has the obligation has also a right. If A. enters into an agreement with B. that B. shall take £1 and make a box for A.; A. has the *right* to B.'s services in making the box, and also to the box itself when finished; and B. has the *obligation* to make the box and hand it over; but then again B. has the reciprocal *right* to get his £1 and A. has the *obligation* to pay it.

According to the fact just stated, that *persons* may have rights (and bear obligations) in various capacities, *i.e.*, in themselves as human beings; as men in a certain State or community; as citizens of a certain country, and subjects of a certain Government; in their family relations, and also as brought into

voluntary (or involuntary) relations with other persons; we have a natural and convenient standpoint from which to regard the *laws* which create, define, and enforce these rights and obligations. Rights and obligations, and the laws that create or define them, may be regarded (1) as concerning "persons" in the aggregate, *i.e.*, as concerning the whole community as represented by the Government or the State. Thus there are laws which define the constitution of the central and subordinate Governments, regulate the appointment and the duties, powers, and privileges of the Crown and of the Ministers of State, and of Parliaments and State departments (in England, Secretaries of State and Government boards or councils). Under this head we therefore speak of *constitutional* rights, and of *constitutional* law, as regulating these matters.[1]

(2) Next, the law creates rights and obligations which we can distinguish as attaching to the individual persons (who are the subjects of the State), in their *public* relations, that is, in their individual relation to the collective body, and its representative—which is the State or the Government in whatever form it exists. And here we speak of *public rights and duties*, and of *public law*. Such are laws (and obligations enforced by them) concerning the payment of taxes, tolls, and customs duties: criminal law and procedure: laws regulating the procedure of Courts for enforcing the (civil) law of private rights: laws regulating postal, telegraphic, and other communications; regarding railways, canals, &c.: laws for establishing and protecting State or national forests: laws regulating the public currency in paper and in coin: laws regulating public health, *e.g.*, sanitary laws; laws regarding prisons, lunatic asylums, &c.

(3) Lastly, there is a vast body of rights and obligations existing between private persons as such, with which the State, or other people generally, have no direct concern. Such rights arise (*a*) out of *natural relationship*—as between parent and child, husband and wife, &c.; (*b*) out of *agreements*, viz., all forms of contract; (*c*) out of acts which give rise to claims for compensation, *i.e.*, wrongful acts, which are called "torts" or *private*

[1] Including, also, the relations of colonies to the mother country, the declaring of war or peace, control of the army and navy, and the law of succession to the throne and to other State offices.

wrongs (as distinct from crimes, misdemeanours, or offences which are *public* wrongs), and (*d*) out of certain circumstances or involuntary acts or events, which give rise to special rights and obligations. Laws dealing with this class of rights and obligations are often classed under the head of "*private* (civil) law."

This three-fold distinction of constitutional law, public law, and private law, is obvious; but it cannot be carried too far, nor can it be made the basis of our classification throughout. It is obvious that these relations of life—private and public—often intermingle and cross each other. When the State, for instance, for various reasons, undertakes the management of forests, and does so in virtue of its being the owner, it has many rights and duties of a proprietor which are governed by the same laws as those which affect private proprietors. Forest officers as such, may be subject to public law as regards their duty, but may also be subject to the rules of private law, as regards sales of forest produce, and contracts they make for works, or acts they may perform in excess of their duty. This crossing or intermingling of relations would give rise to confusion. In order therefore to have a greater facility for study, we proceed to classify *rights and obligations* in another way.

But before we proceed to consider this scheme of classification, let us pause a moment to answer the question—to what extent are we to carry our study of the law? However classified, the entire series of "rights" and "obligations" arising in one way or another, is a very large one; and it is desirable to be reassured at the outset, and not to start with the feeling that we are going to commit ourselves to a wide sea which has no shores. Let us at once be satisfied that our survey of law will be an extremely limited one. There are however several ways in which we might effect a limitation; and these ways are not all equally desirable. I might for instance, start with special enactments (or the unwritten laws, as explained in text books), which relate directly to Forests; and I might simply read out and comment on, those provisions, saying nothing about general principles. This course would however soon prove to be both difficult and unprofitable. And at best it could be followed only with the result of obtaining a very empirical knowledge and one which would be difficult to retain in the memory, and

still more difficult to enlarge or apply properly, as occasion hereafter might require. It has been said, "he knows not the law who knows not the reason (or underlying principle) of the law." Therefore it is desirable to lay a certain foundation, and to understand the general framework—the main ideas on which the specific laws we are concerned with, rest. Only I shall try and make this *general study of principles* as simple as possible and confined to what directly leads up to the forest law and concerns it.

A forest officer approaching the study of law, is in the position of a person entering a library, the books of which are all devoted to one large subject, and which are arranged in shelves—each shelf belonging to a special branch of the whole. Practically, he is concerned only with certain shelves, and, indeed, only with certain books in the shelf; but there are obvious advantages to be gained from understanding what the whole library consists of, and how its shelves or divisions are arranged.

In the first place, I must observe that we at once discard from our consideration a large body of law which goes beyond the individual and the public of any one nation or State, and deals with the relations of nation to nation. This is called International Law; it is both "public" and "private."

Public International Law deals with the questions of war and neutrality, the laws of capture, of contraband of war, &c.; here it is a question of right between one nation as a whole and another. Private International Law deals with questions which arise out of individual rights in one country, in their relation to the law of another country. A very common instance, is the question of the effect in England of a judgment of a Court (say) of France or Germany.

We also pass over the entire body of law, concerned with the *Constitution*, the Crown, and the Government of the country, its Parliament, and law of election and representation. Of *Public* law, also, we shall have very little to say, except as regards two branches—(1) the Forest law, (2) the Criminal law, or law preventing and punishing acts of individuals, when those acts concern the security of the public. For the rest, the laws of taxation, of health, of inland revenue, and regarding communications—post-office, railways, and others, will not occupy us. As to the *private law* of persons and things we will speak

presently. Here, however, we can note generally, that our study will exclude all that part of private law which relates to natural relationship, and *status* in life. Our whole study will, in fact, be limited to (1) certain branches of the private law of persons and things; (2) to a sketch of criminal law and procedure; and (3) (in more detail) the Forest law.

In the continental schools, a somewhat more extended programme is undertaken; and the text books go through the entire scheme of constitutional, public, and private law, of course only touching on the main heads and principles. I have not thought it practicable to attempt so much. I will, however, present you with an outline of the general framework of the (private) law of persons and things: and for this purpose I will first of all give you a table or conspectus (in two parts) which I have abridged and adapted from that given by Dr. Justus Olshausen in his text book for the Eberswalde Forest Academy. It is not expected that you will remember or be able to write out this table as a whole, but it will be available for reference, and will serve as a guide to the order and sequence of the remarks I have to offer.

In order to explain the table, let us revert once more to the question of classifying rights. As a basis of grouping, we make use of the obvious distinction of "persons" and "things," already alluded to (p. 6). All rights and obligations reside in, and attach to, "persons." "Things" are the material (but sometimes the incorporeal) objects around us, and in respect of which, rights exist. And we commence by briefly examining, and trying to lay hold of, certain general ideas concerning (A) the nature of rights and obligations in themselves; (B) concerning rights as they subsist between person and person, or, as the lawyers say, concerning "personal rights;" and (C) lastly, concerning rights to and over things, or, as the lawyers say, concerning "rights *in re*."

# CONSPECTUS.

## *PART I.*

## (PRELIMINARY LEGAL NOTIONS.)

### A. GENERAL IDEAS ABOUT RIGHTS AND OBLIGATIONS.

I. **The meaning attached to the term Legal right** (ideas involved in "a right.")

II. **Rights regarded as the creation of Law.**—(Written Law.—Unwritten or "Common" law—Custom.—Characteristics of law.—Extent and binding force of law.—Laws and "executive" orders.—Interpretation of laws.)

III. **Rights regarded as arising out of human dealings and acts, and out of events.**—(Causes which produce rights or divest persons of them.—Facts are either "Events" or "Acts."—Necessary characteristics of a legal act.—(*a*) Done voluntarily for a purpose.—(*b*) consciously.—(*c*) manifested outwardly.—Remarks on these three characteristics.—Legal acts affected by conditions.—Effect of *events*.—Effect of lapse of time.)

IV. **The protection of rights and enforcement of obligations in general.**

1. Private force or self-help.
2. Preventive action of law.
3. Remedial action of law.—(*Injunction—specific performance—damages.*)

### B. GENERAL IDEAS ABOUT PERSONS.

(*Natural persons—Normal and abnormal persons—Artificial or Juristical persons.*)

### C. GENERAL IDEAS ABOUT THINGS.

(*Classification of things—corporeal—incorporeal—moveable—immoveable, &c.*)

Referring to this *conspectus* it is easy to understand that under the heads—**A**, **B**, and **C**, we shall have to consider some general points which we need always to bear in mind, in order to understand almost everything that follows. Having thus gained some elementary conception of what is involved in the terms "right," "person" and "thing," *in general*, we next come to (Part II.), those general legal principles which relate to *particular kinds* of rights and obligations (Private Civil Law).

How are we to classify or arrange these rights and obligations conveniently, according to their kind, so as to be able to examine them? There are several methods of classification recognized; and they are discussed in the standard works on Jurisprudence. I am not going to trouble you with any details, and I therefore adopt without discussion, a classification that will best suit us. This classification of rights (according to their kind) depends on the fact already alluded to, that "*persons*" are the subject of rights; and these persons have (I.) rights arising without any kind of action, dealing, or agreement, on their part, and merely by the fact of their birth or existence—as members of a certain Civil society, or as in a certain condition of life, or as members of a family and having a certain natural relationship to one another. This class is distinguished by the fact that the right comes into being *independently of any action* of the parties. (II.) Rights which arise solely in consequence (*a*) of some dealing, or relation voluntarily entered into, with other persons: or (*b*) arising under certain circumstances. (III.) Rights which exist in connection with "things."

*PART II.*

## GENERAL PRINCIPLES OF THE LAW OF PERSONAL RIGHTS AND OBLIGATIONS. (CIVIL (PRIVATE) LAW.)

### I. STATUS RIGHTS, &c.

### II. RIGHTS AND OBLIGATIONS OF PERSONS ARISING OUT OF DEALINGS WITH OTHER PERSONS.

**(A) The parties concerned.**

(The right-holder (*creditor*)—the obligation holder (*debitor*). Cases where there are one or more than one party on either side, *e.g.* principal and surety.)

**(B) The substance of the right and obligation.**

(Performance—compensation for failure to perform—interest on debt.)

**(C) How the right, &c., arises.**

1. Out of contract or agreement, (here we consider what a *contract* is: when it is *valid* and when it is *void*.)
2. Out of some relations that *resemble* contract, but there is no *actual* agreement, either express or implied.
3. Out of *wrong-doing* or "tort."

**(D) How the obligation, &c., acts or operates.**

(Nature of performance, as to extent, mode, time, and place.)

**(E) How the obligation, &c., ceases or comes to an end.**

### III. RIGHTS (OF PERSONS) IN AND OVER THINGS.

**(A) Possession.**

1. Its legal nature and various kinds.
2. What things are capable of possession.
3. How it may be lost.
4. Legal consequences of possession.

**(B) Ownership or right of property.**

1. Modes of acquisition:
   1. Prescription.
   2. Accession (including rights in game and fisheries.
   3. Forms of transfer.
2. Nature and special features of ownership.
3. Legal restrictions on the right of ownership, (*a*) in general, (*b*) special in Forest estates.

**(C) Rights enjoyed by one party on or over the property of another.**

1. General nature of such rights.
2. Mortgage—Pre-emption and other special rights.
3. Rights of *user*—"easements" or "servitudes"—including *usufruct*.

I have explained that it is not my intention to include class I. in our study. Rights of persons as *citizens* (right to freedom of person, to protection, to vote, &c. &c.) and *family rights*, as father of a family, husband of a wife, guardian of a ward, &c., we shall pass over. We shall confine ourselves to heads II. and III. These it will be observed, have a *feature common to both*, on which account the German writers call them collectively, "*vermögens-rechte*"—a term for which I wish I could find a neat English equivalent.[1] I can only explain the common feature by saying that these rights are all concerned with some benefits, interests or advantages which the law recognizes and enforces, as constituting or contributing to a man's *means* of *livelihood*: or which go to enable him to live or carry on his worldly existence in comfort, in his natural station, occupation or position.

I think this general scheme—or abstract of the contents of some of the shelves in our imaginary law library—will be at once intelligible to you. The remarks which follow, will deal *seriatim* with so many of the headings as it is desirable to comment on; others will be passed over with hardly any notice. For example, in the case of rights arising out of *contract* and *tort* II. (C. 1, 2, 3,) which would occupy a long course of lectures and require detailed study for the barrister or solicitor, we shall only briefly deal with general outlines. But head III. (A. B. C.) on the other hand, so directly concerns the basis of the special Forest law, that we shall have to consider more carefully a number of points coming under each of the sub-heads.

The group of subjects represented by the headings of the Conspectus (Part I. and Part II.) will constitute the whole of our study of the *General principles of the Civil (Private) Law*. We shall then proceed to deal with the general features of *Criminal Law and Criminal Procedure*. The remaining part of our course will consist of lectures on *Forest Law—i.e.* on the special treatment of Forest property (and rights concerning it) as provided by law: on the legal protection of forests, by means of the special Forest Acts and also the general Criminal Law; and (finally) on the Forest Service, regarded as the subject of legal regulation.

[1] In the dictionary "Vermögen" means ability, faculty, &c., and in the phrase above, it refers to the whole of the "means" or "facilities" which a man possesses for continuing his daily life and occupation.

# LECTURE II.

## (A) OF RIGHTS AND OBLIGATIONS IN GENERAL.

### 1. The meaning attached to the term "Right."

The term which will most naturally first attract our attention is one that we have been obliged already freely to make use of.

By "right" we mean only (for our present course) such a right as the law recognizes; in short we deal with legal rights only. A person who has only his own force or power of persuasion to enable him to do something, may possess the "ability" or "might" to act, but not necessarily a "right." If, further, public opinion approves of his doing something, and disapproves of others interfering with him in so doing, he is said to have a "*moral* right;" but this again is not necessarily a *legal* right. A man who loses money at a game of whist is "bound in honour" to pay it, and society has a distinct feeling on the subject; but no legal right to recover the amount would be recognized in a court of law. If, however, irrespective of a man's own ability, or of the public approval or sentiment, the *State* will protect him in doing as he wishes, and will compel such acts or forbearances on the part of other people as are necessary in order that his wish may be carried out, then he is said to have a "legal right."

In the notion of *right* it will be observed, four terms are involved:—

1. A person entitled; 2. An object; 3. An act or forbearance; 4. A person obliged. But it is not necessary that all four should actually exist together. To take Professor Holland's example: a testator leaves his daughter a silver teapot; the daughter is the *person* entitled (1), the teapot is the *object* (2), the delivery of the article to her is the *act* (3), the executor or person having care of the deceased's estate, is the *person obliged* (4). The "object" may not always exist: *e.g.* A. has a right to B.'s services under agreement, here A. is (1) the person entitled, service is the act (3), B. is the person obliged (4); there is

no direct *object* (2). Or the "object" may be more or less ideal or metaphorical, *e.g.* I have a right to my reputation and the law will give damages against any one who defames me. Here I am the person entitled (1); my reputation is the (rather metaphorical) object (2), the forbearance to injure it is (3), and the person obliged is (4)—in this case, all my fellow subjects. This leads me briefly to note that some rights exist against one or more persons in special relation to the right-holder (*jura in personam* of the Roman lawyers); others against all the world (*jura in rem*).[1] It may here be repeated that whenever there is a *right* which is declared, recognised, or defined by law, there is always an *obligation* on some one person, or more than one, or on the public at large (all persons subject to the law) to respect that right—to do or not to do something. Without this the right would be inoperative; it is hardly possible to conceive a person having a right and yet no one having any corresponding obligation at all. And whenever there is a right, and it is infringed in any way, there is always a legal remedy; a suit will lie.

### 2. Rights regarded as the creation of law: Remarks on the "Common" (or unwritten) law, Custom, and Statute law.

The rights that we are concerned with being only *legal* rights, these rights are established and defined, or are at least recognised, either by written law (Statute or Act of the Legislature) or by "Common" law. "Custom" is also recognised, as applying generally to all classes, or as a special rule applying to a particular class of persons, or to a particular part of the country, or to a particular trade, or subject. In England what is known as the "Common law" is really general customary law which has become fixed by the growth of centuries and has been formu-

[1] The student will not confuse between the terms *jura in re* and *jura in rem*. The former refers to rights in respect of "things" (*Sachenrecht*), the latter refer to rights which do not concern any "thing," but which avail against every one in general, not only against some determinate person the "person obliged" is here so general or indeterminate, that attention is turned rather to the object or the act of forbearance (*rem*). So a judgment which declares an absolute right or status, *e.g.*, that a woman is or is not lawfully married, is said to be a judgment *in rem*, because it concerns the whole body of subjects of the realm, and is not like a judgment which merely decides that B. owes A. (and not the whole world) a certain debt, duty of service, &c.

lated in the course of the administration of justice, by courts and judges; it is now known from "precedents" and "reported cases," and is explained in text books. Particular customs of places (and tribes or castes in India) are allowed to be enforced, provided they are proved to exist as certain, uniform, and always observed; provisions will often be found in Acts of the Legislature directing that certain sections of the Act are to be taken subject to any custom of trade or business, or to a local custom. Customs, besides being uniform and of long standing, must not be opposed to public morality, or policy, or to any positive law.

Whatever the form of the law—written, unwritten, or customary, it has (as regards rights) this feature, that it declares or recognises a *right* in one or more persons, and a corresponding *duty* or *obligation* lying on one or more other persons. The law is always armed with a *sanction* (p. 7), but the sanction is not always directly mentioned. In fact it is much oftener a matter of principle, forming a branch of law in itself, as (*e.g.*) the law of *damages*. If the right is infringed, the court, before which a suit is brought, will decree the appropriate remedy or award damages; the application of these is the sanction of the law. Criminal law, however, which threatens specific fines or other penalties for breach of its several provisions, is an instance of law where the sanction is directly expressed in all cases.

As rights may be created by law or custom, so there may be a cessation of rights by law; or one custom may have become changed or abrogated by another custom.

A few words have to be said about the written law. In England, the Parliament can make laws for the whole dominion. But India and the colonies have Legislatures of their own as provided by constitutional law.[1] There is nothing to prevent the British Parliament from passing (*e.g.*) a Forest Law for India; but in practice such matters are left to local legislation.

Laws usually declare their *local extent*, *i.e.*, whether applying to the whole empire or to some part of it;[2] and in their nature

[1] For example, India is governed pursuant to an Act of Parliament of 1858, called "An Act for the better Government of India." And its local and central Legislatures are provided for and regulated by the "Indian Councils Act," 1861. Both statutes have since been amended and added to by later Acts.

[2] In India, before 1874, owing to the way in which the various provinces were

also (as apparent from their language) apply, either to all persons, or to some particular class.

"Acts" of the Legislature come into force either from the day of their final "passing" (*i.e.*, assent of the Crown, or in India, assent of the Governor-General, or Local Governor as the case may be);[1] or from some day which the Act itself provides; and in some cases it is left to some local authority to notify (in the *Official Gazette*) on what day a law is to "come into force."

Sometimes the "Act" contains the whole law; but often it provides that subsidiary matters, regarding which local requirements may vary, shall be provided for by "rules" (having the force of law) to be made by local authority; such rules must not of course contain anything inconsistent with the Act itself. It is often the case that companies or corporations (local boards, municipalities, railways, etc.) are empowered to make bye-laws carrying penalties. Other such bodies make *rules*, but these bind the members and persons dealing with them, not as laws, but as agreements, or conditions of business.

All persons, in general, are supposed to know the law; and that although in reality few people know more than a small part of it; this is usually explained on the ground that the business of life could not be carried on if people were allowed to escape on the plea that they did not know that such and such was the law. As a matter of fact, a good deal of difference is made between alleged ignorance of common rules of natural obligation, such as not to steal, forge, &c., and purely technical rules. In a criminal charge for instance, of breach of some technical or artificial law, a magistrate would deal more leniently with a person who appeared really ignorant than with one who had knowingly offended.[2]

acquired and added on to the existing dominions, it became doubtful whether certain laws applied to all provinces or only to some of them. An Act (XV. of 1874, called the Laws Local Extent Act) was passed to remove such doubts. And in order to make provision for the judicious application of laws in certain districts which were in a backward condition, and required special treatment, another Act (XIV. of 1874) constituted "Scheduled Districts," in which the Local Government is empowered to declare what laws are in force and what are not. After 1874 all Acts specify their local extent.

[1] For which reason, in authorised editions, it is always noted that the Act, &c., "received the assent of the Governor-General on such and such a date."

[2] The Roman law allowed *ignorance* to be pleaded by certain classes and in

It should here be remarked that a number of rules and regulations of much practical value are made, not by legislative authority, but by the executive; they are expressed in "circular orders," "ordinances," "general orders of Government," etc.[1] These deal with matters which *do not create or restrict rights directly*, but provide for the convenient despatch of business, or prescribe the way in which public servants are to conduct themselves or to manage property entrusted to their care, or how private persons are to proceed in getting what they want from public offices. By such rules Government can regulate terms of service, questions of precedence, age of joining and retiring, pension, leave, subordination of one grade to another, mode of correspondence, forms of keeping accounts, modes of leasing or selling Government property, conditions of spending public money, public duties of reporting facts and preparing returns of business and statistical information. But when Government desires to subject its employés to certain liabilities as public servants, *e.g.*, to regulate their trading or holding land, it usually does so by legislation. Except within the obvious lines of the principle that rights can only be abridged, and that responsibilities carrying direct liability to (criminal) penalties, can only be imposed *by law*, it is matter for the policy of each Government to determine whether a legislative enactment is needed.

The tendency of the English Government is to leave as much as possible to be matter of agreement and "terms of service;" and not to invoke legislative action beyond what is absolutely necessary. In other countries, we find many things regulated by elaborate provisions of law, that in our Government are regulated only by official rules or by executive order, or agreement, as the case may be.

certain branches of law (not those, *e.g.*, of natural obligation, not to steal, that debts must be paid, &c.): and in English law there are some traces of an allowance for ignorance, as in the case of a man's selling land in ignorance of his want of title (Student's Austin, p. 239). In the Contract law, specific provisions will often be found as to the effects of mistake *of law* and mistake *of fact*.

[1] Such orders may have the "sanction" of penalties; but indirectly. A public servant, for example, may be liable to suspension, degradation in rank, or dismissal from the service for disobedience to them; but the penalty is theoretically a matter of contract:—by entering service and taking pay, the public servant (expressly or impliedly) binds himself, or undertakes, to obey the orders of Government, and to submit to the usual penalties (above mentioned) if he disobeys.

Apart from this consideration, it will also depend on the state of advance in civilisation and on the complexity of the relations of social life and of commerce, to what extent the Legislature interferes. In India, for example, Forest Law is a much more simple and elementary thing than it is in Prussia or Saxony. In England "Forest Law" as such, is, owing to difference of local circumstances, hardly known. And, generally, taking a German text book on such a study of law as we are now making, we shall find many references to distinctions, as well as to national institutions, which are quite unknown in England or in India: this is due to differences in the stage of society or in the historical surroundings under which institutions developed themselves.

But to return to the consideration of formal Statute law. When a law declares certain things, it is, in general, understood to apply to the future, *i.e.*, from a certain date onward, and not to have *retrospective effect* unless that is expressly provided.

As to the right understanding or true meaning of laws (and legal documents generally), as the clauses are framed in a precise and formal manner and in language (more or less technical) that is familiar to experts in drafting Acts, it is also a matter for lawyers to make out the meaning (in case of doubt) according to established rules. It is not necessary for us to go into the question; but I will just mention that text books often assert the broad rule, that when an Act restricts rights or imposes onerous obligations or penalties, it is to be construed strictly—because no one should be burdened beyond the exact limit intended; but that if the law is an "enabling" one or intended to confer a benefit, or a useful power of action, it should be read more liberally. This principle however should be taken with some caution.[1] It would be more generally true to say, that subject to certain rules of interpretation, the fair import of the terms of the Act should be considered; and, whether civil or criminal, penal or beneficial, the due effect should be allowed to those terms; neither confining them in one direction or enlarging them in another, but using them to promote justice and effect the objects of the law.

[1] See the remarks in Dr. Whitley Stokes' Anglo-Indian Code, Vol. I., p. 70. The Privy Council applied the rule in one case at least.

### 3. Rights arising out of human dealings or actions; and out of events.

It is not enough, however, merely to refer to custom and "Common Law," or to written or Statute law, as the foundation of rights. Without them, indeed, rights and obligations in the abstract would have no regular legal existence or enforcement. But in a very large number of instances, in order that specific rights may arise in the case of A., B., or C., as individuals, there must be the occurrence or existence of certain *facts* which give rise to certain relations. These facts are either "*events*"—*i.e.*, movements of external nature not ordinarily under human control (as birth, death, a shipwreck, an accidental fire), or "*acts*" of men; which, in the wide sense, are the result of will, and are therefore under the control of the doer.[1]

Acts are only legally recognised (*a*) when voluntarily directed to a purpose, (*b*) when done consciously, (*c*) when manifested by some external sign;—inward acts, which exist only in the unmanifested thought, we do not take count of.

As to (*a*) an act being done voluntarily or with a purpose, it is only necessary to call attention to the difference between "will" and "intention." "Will" has to do with acts; "intention" with the consequences of acts. I may *will* to make the muscular movement or action necessary to pull the trigger of a gun, but I may not *intend* that the discharge of the gun should result in hitting or wounding any one. But for practical purposes, an act is held to be done "voluntarily" when there is either an actual intention to produce a certain effect, or a knowledge (or reason to believe), that such an effect will, in the ordinary course of nature, be produced. And so also when there is a total carelessness or indifference as to what will happen—practically it is the same as if an intention to cause the (natural, or inevitable) result had existed.[2]

[1] An act is distinguished as having a *purpose*. "He jumped from a tower in order to kill himself;" that is an *act*. "He fell from a tower and broke his neck;" that is an *event*; there is no exercise of the will, or action with a purpose.

[2] Thus the Criminal law holds a man responsible, when his carelessness, *i.e.*, utter want of attention to the natural consequences of his act, is such as is inexcusable. He is as much responsible for the resulting mischief as if he had intended it. A person who without any excuse, or "for fun," should fire a loaded

In connection with this subject, "negligence," or inattention to probable results, may be mentioned.[1] A man is constantly held responsible to exercise a certain amount of care and attention, omission to do which is "negligence." And there are recognized degrees—gross negligence, slight negligence, &c.—which correspond to the requirement to take great care, ordinary care, or slight care, as the case may be. Very often the amount of care demanded (and therefore the responsibility for corresponding negligence) varies with the amount of benefit which the person obliged has received: *e.g.*, if A. lends B. a valuable horse to use, under such circumstances that the benefit is wholly on the side of B., the latter is bound to use the greatest care, and will be liable for even a slight degree of negligence. If the loan is for hire, so that each party gets a certain benefit, then B. is bound to take ordinary care, and is liable for ordinary negligence; should the horse be left in B.'s charge solely for the benefit of A. (and none whatever for B.), the latter would be bound to take ordinary care, and would only be legally liable for "gross" negligence.

Then as to (*b*) consciousness in an action. An act (*e.g.*, a will or an agreement) of a lunatic is not binding, because there is no capacity to judge of consequences; so minors or "infants" are in many cases regarded as having no sufficient *conscious* volition to make their acts valid. Drunkenness destroys consciousness, and therefore it will invalidate an agreement, or at any rate make it voidable if the party on recovery does not choose to confirm or ratify what he did.[2] As a matter of defence, *i.e.*, excusing the responsibility for crime, in Indian law, intoxication can be pleaded only if it was involuntary, *i.e.*, caused by the administration of some substance against the will of the person, or without his knowing that it would make him intoxicated.

gun into a crowd, would be guilty of murder if he killed any one. He may not have designed to kill any one, but he must have known that his act was almost certain to cause death or injury likely to result in death, or at any rate, he showed a criminal indifference as to consequences.

[1] In general we use the term "negligence" with reference to *negative acts*, *i.e.*, "omissions;" and the term "rashness" with reference to *positive acts* of a risky character, and to acts done without advertence to consequences.

[2] In English law the act is *voidable*, *i.e.*, in the option of the person sought to be bound; he may "ratify" it on becoming sober. Under the Indian law the act is "void," *i.e.*, regarded as never existing; it cannot, therefore, be ratified though, of course, the same thing may be done again in a state of sobriety.

Intoxication otherwise, might be taken into consideration in estimating the character of an offence and in awarding a certain degree of punishment, but it is not an absolute defence as lunacy would be.

A person may be of full age, sane and sober, and yet his consciousness" in performing an act may be affected by his being under a "mistake of fact," or a "mistake of law." I shall only call attention to this, but not go into details. In illustration I may give the case of a police officer, who, acting with due care, and honestly (but wrongly) believing A. to be a criminal whom he is bound by law to arrest, takes him to a police station: here the officer has committed no offence, and incurred no liability through his mistake as to the person (mistake of fact). Supposing, however, a forest guard honestly but erroneously believed himself to be bound by law to arrest a person whom he found using *any* road in a forest, forgetting the distinction between authorized or public, and unauthorized, routes; he would be liable for his "mistake *in law*." Hence the maxim "ignorance of fact excuses; ignorance of law does not excuse."

A person is not responsible for the *accidental* consequence of an act, in itself lawful, and done by lawful means and with proper care and caution. A person, *e.g.*, lighting a fire at a camping ground in a forest, obeying the rules and taking all care, would not be responsible if a sudden gust caught up a bit of burning stuff and carried it into a neighbouring place and set fire to the grass or wood.

So much for the will and intention of the doer of any act and his consciousness, as far as they depend on his own personal state of mind.

But will and consciousness may be affected by the influence of some external agent, and so the act be rendered inoperative in law; as where a person is made to do a thing by *physical compulsion* (*e.g.*, the hands held and guided to write a name), or by threats or fear (*coercion*); or again, by *undue influence*; or by *fraud*, or *misrepresentation*.[1]

[1] These three things will be found excellently defined in the Indian Contract (IX. of 1872), sect. 15. And we shall naturally hear more about them in the Criminal Law Lectures.

There is yet a *third* matter. We have considered two essentials of an *act*, (*a*) exertion of the will for a purpose, (*b*) consciousness; the third (*c*) is that there must be a *manifestation* of the will. It may be by gesture, by word, or by writing, but it may also be implied or tacit; as where a particular action or course of conduct *implies* something to follow (or where words used or a writing, *imply* something else). If you take a pair of gloves from a shop, you *imply* an agreement to pay the price marked, though nothing is actually said about payment. The manifestation of will may also be by means of another person, "*facit per alium facit per se.*" The manifestation may be *formal* or *informal;* and sometimes the law will not recognise an informal act. Under the Indian Transfer of Property Act, 1882, if you wish to sell a house worth Rs 100 or more, you *must* manifest your act by writing and get it registered, or there will be no valid transfer. In other words, the act is *void*, *i.e.*, regarded in law as if it had never been done at all.

Acts may also be *voidable*, that is, void only if the person concerned chooses to make them so: if he does not choose, he is said to "ratify" the act. Thus, in English law (but not in India) if a person makes a bargain when he is drunk, it is "voidable" in his option. "Ratification" in law goes back to the origin of the act, and makes it as if it had been good from the beginning. A "void" act cannot be ratified, for it never existed at all for any legal purpose.

Legal acts may be affected by some *condition* being attached; and they will only take effect when the condition (which may be an "event" or some other "act") is fulfilled.[1] In connection with this question of *conditions* as affecting acts, it would be possible to allude to rules of law by which certain conditions of time and place are always (in the absence of an express intention otherwise) understood to apply; but it will be more convenient to reserve the subject for another head.

It may also be that *events*, which are not the direct result of conscious action, give rise to rights. Death may put an end to rights or may give rise to new rights of heirs and legatees. A birth often alters the line of succession to estates, and affects

[1] The special Contract Law has of course many details about "conditions," *e g.*, at about the effect of a condition which is impossible, or contrary to law.

the prospects of other persons, if not their existing rights. And accidents, mistakes, &c., which are not conscious, voluntary "acts," but "events," may give rise to various rights and obligations.

Besides the effect of *acts* and *events*, the mere *lapse of time* may have an important effect. We shall see hereafter that rights may become fixed and may also be lost, by the lapse of time; but the few details on this subject that are necessary will be better given later on. The effect of *time* in this respect is usually governed by special laws often called "Limitation" laws, which prescribe different periods within which certain acts must be done or steps taken (as filing a suit in Court and so forth). They also prescribe limits within which alone it is allowable to claim things which another person holds. If you choose to allow a man to keep, in open, peaceable enjoyment as his own, your house or land, or your horse; after a certain time his right will become perfect by "prescription." Originally, many properties must have come into people's hands, *how*, it is now difficult to say; and it is only reasonable that after the lapse of a certain time, no interference should be allowed. On the same principle, if you do not enforce a debt or obligation which has become due, or a right which has been infringed (or threatened) within a certain legally fixed time, it will be lost altogether.

### 4. The Protection of Rights and Enforcement of Obligations.

Having spoken of how rights arise and how they cease, it is natural to add a few words—which complete a general conception of the subject—as to the means by which, and modes in which, rights are protected, or given effect to. There are certain cases in which a man is entitled to protect his own body and property (or that of another person). This is called the right of private-defence: but as the subject must be noticed more in detail under the head of Criminal Law, I will here only make the general remark, (*a*) that the right only exists against acts which are criminal offences, not mere civil wrongs for which a legal compensation is claimable; (*b*) that it never arises against officials doing what they are bound by law to do; (*c*) that it never

extends to doing more harm than is absolutely necessary; and (*d*) that it never exists at all when there is time and opportunity to apply to public authority for help.[1]

The law constitutes certain authorities whose business it is to protect rights and enforce obligations.[2] These consist of a police force organised and enrolled under a special law; also of Courts of Justice of various kinds, civil and criminal. The law operates in two ways. It endeavours to *prevent* infringements of rights, and it provides a *remedy* when rights have been infringed. Legal action is thus said to be (1) preventive, (2) remedial. The *preventive* means, whereby the commission of offences and (in general) all acts tending to the infringement of rights or the omission of duties, are sought to be obviated or prevented, consist in certain powers of civil courts (and also magistrates) to issue "injunctions" and orders regulating various matters, in anticipation. They are more especially exemplified by the legal powers of the police force, and those conferred on special officers of Excise, the Post-Office, Railways, &c. The powers of the Forest guard or protective staff of a forest district often come under this head. In general, the police or other force which the law arms with powers aiming at *prevention*, has also the duty of *discovering* and *investigating* offences and bringing the offenders to justice when an offence has actually happened.

When it comes to enforcing private rights that have been infringed, Civil Courts, under judges (with various titles), are constituted to give redress and settle doubts. Where the whole society would be injured by certain acts, or where peace and social order are threatened by them, those acts are called "crimes" or "offences."[3] They are dealt with by the (public)

[1] For this reason a man cannot safely or legally protect his estate from trespass by putting about steel traps or spring guns or other devices of a dangerous character: for should any one be injured, he would be liable, and very seriously, if death were caused or any grievous hurt; for though the person might be committing (the merely civil wrong of) trespass, or even (conceivably) a criminal trespass, still it is not for the private owner to make such a form of reprisal.

[2] It is hardly necessary to add that in some cases *arbitration* may be a means of settling cases. That is usually by consent of parties (sometimes specially provided by law without consent) and the law usually makes provision for enforcing the decision of arbitrators, in case one of the parties will not voluntarily obey it.

[3] Different names are often applied according to the *gravity* of the act; thus in England we have "misdemeanours" and "felonies," and elsewhere "delicts" and "crimes," &c.

criminal law and punished. The public officers who decide these cases and award the penalty, are criminal judges, and magistrates. The term "judge" is used both for Civil and Criminal Courts, but "magistrate" means only an officer dealing with criminal law. Of course, the same persons may preside both in Civil and Criminal Courts.

It may often be the case that an act which is a criminal offence is *also* a private wrong calling for compensation to the individual. It used to be held in English law, that the minor case was "merged" in the criminal act, and there was no separate remedy: but this rule has later on received such large modification that it can now hardly be said to exist. In India it never applied at all. Both remedies are available.

In Civil cases, where it is only a question of right between man and man, the law provides a means of enforcement by an Action at law; that is, the injured party can bring a "Civil suit." This right to bring a suit (*klagerecht*) can only be pursued where there is a "cause of action" which the law recognizes—a question of some *legal* right (p. 17). If you brought a suit to recover from a friend the amount of a bet at a horserace, or the sum lost to you at whist, the Court would reject your suit; you would have no "cause of action"—no *legal* right (whatever moral right or claim in honour, &c. you might have) on which, your plaint is based. But supposing your claim is legally admissible, and is proved, and not based on error; the means which the Court can adopt (in a Civil suit or action) to give relief, are various. To some extent they are *preventive*, but most commonly they are *remedial*. As already remarked, the Court can issue an *Injunction* which will prevent a threatened evil, or prevent the repetition or continuance of one. Injunctions are *perpetual* or *temporary*, according to circumstances.[1] In some cases the Court will enforce the "specific performance" of an agreement. In India, an Act of 1877 regulates this. "Specific performance" (it is perhaps unnecessary to explain)

[1] Magistrates (*i.e.* officers with criminal judicial authority) are also able under the Criminal Procedure Law or the Police Law, to issue orders of the nature of injunctions: as where they order a crowd to disperse, or a person to remove an obstruction from a public roadway, or stop some nuisance, or regulate a procession moving in a certain direction. We shall speak of this hereafter.

means, making the defendant do the very thing he had undertaken to do—and not merely to pay damages for non-performance. It is not however practicable in all (or even in most) cases to enforce the performance of the actual contract—make a man do or deliver the very thing he has undertaken to deliver or to do; specific performance can be decreed only in certain cases; and those, speaking generally, *are cases in which money equivalent is impossible, or is of no use;* as where there exists no standard for ascertaining the actual damage caused; or where it is probable that no pecuniary compensation can be got. But it is provided expressly by the law, that a contract to sell houses or lands (immoveable property) shall be held to be among those things for which pecuniary compensation is not available, because it is usually the case that money would be no real satisfaction; and moreover it is nearly always possible, if not easy, for the person to transfer the actual property bargained for—much more easy than it is to estimate the pecuniary loss arising from his refusal or neglect.

There are some cases where it is a sufficient aid to a plaintiff, to give a "declaration" of his rights in the matter of the suit: this will protect him in future.

In most cases where actual relief or remedy is sought, it is only a *substitute* for specific performance that the law can give. That substitute is a pecuniary compensation for the loss occasioned by the breach of the right or obligation, in the shape of "damages." "Damages" are awarded by the Court for a breach of *contract* or for a *wrong*. In the former case there is often no great difficulty in fixing what the damage really was: in some cases however there is; and there are various rules of law (and well-known text-books exist on the subject) explaining how damages are ascertained or calculated. It is obvious however that, especially in cases of "tort" or "civil wrong," it may be more difficult to assess the injury done at a money value. For though *all* legal wrongs give a man the right to have them redressed (by the Court), yet there are many cases of infringement of right[1] in which the actual loss measured in money, is

[1] As when, for instance, a person had a right to vote at an election and his name was wrongfully excluded by an officer, from the list of voters; here the pecuniary loss would be nil; but the Courts held that the plaintiff having a

small, or it is impossible to fix; then the plaintiff will get his right declared but "nominal damages" are enough. In most cases of slight wrong, "ordinary damages" are awarded; or in a gross case, what are called "exemplary damages."

In contract cases, where the damages are not easily ascertained, it is usual for the parties to agree that a certain sum shall be paid in the case of breach; and this is called "liquidated damages." Generally they are allowed in cases where the real pecuniary loss cannot be ascertained, *and* where the Court will hold that the parties intended to fix a sum, knowing of this difficulty; but the Court will not award a "penalty" entered in a contract, or a large sum of damages specified as "liquidated damages" where it can ascertain the real loss.

In Indian law, the rule is somewhat different. The Court will never give *more* than the sum fixed, but in any case it will only give what it finds reasonable under the circumstances. This does not apply to bail bonds, &c. (bonds binding a person to appear under a certain penalty), or bonds for the performance of public duty or of some act in which the public is interested: here the whole penalty may be enforced, the details may be seen in sec. 74, Act IX. of 1872—the Indian Contract Act.[1]

I have spoken of the civil courts as enforcing *legal* rights and giving a remedy. They are open to every one who is of age to act (and to the guardian or representative otherwise). The Crown in England cannot be sued; but redress is obtained by an analogous procedure called a "petition of right," which is heard in certain courts only, but like any other suit, with pleadings and argument. In India, by express provision of law, the Secretary of State for India in Council (practically representing the Crown) *can* be sued, because he is placed by the law in the

right, had also a remedy; and here, no doubt, the Court would secure the right by *enjoining* the proper officer to receive the vote; and if he refused or neglected, he would be liable to substantial punishment for "contempt of Court."

[1] In certain cases, where persons enter into bonds required by a rule under the Forest Act for certain duty or work in connection with forests, and a penalty is inserted in case of breach, the whole of the penalty is made recoverable, by the Forest Act (sect. 80). This is in excess of the exception mentioned in the text, because such contracts might not come within the (restricted) meaning given to the term, "act in which the public is interested." The provision is enacted because of the importance of the subject, and the necessity that exists for holding a strict hand over people who are entrusted with those works and duties. The penalty, moreover, can be summarily recovered, without a suit.

same position as the old "East India Company," which could sue and be sued in its corporate capacity. Any government suit in India is brought by or against the "Secretary of State for India;" as all Local Governments or public Departments are merely his delegates. And there may be a distinction between a suit brought by or against the Government as a whole (where the "Secretary of State for India in Council" is named as *plaintiff* or *defendant*), as on a claim for some property or payment against the State or the Public Treasury: and a suit against some official for an act done in his public capacity, for which the Government is liable, and the officer, personally, is not. That is why we sometimes see suits entitled "So and so *versus* the Collector" (of such and such a district), or *versus* "the *Conservator of Forests.*"

### (B) GENERAL IDEAS ABOUT "PERSONS" (REGARDED AS THE SUBJECT OF RIGHTS).

As society became established and its relations grew more and more complex, it became convenient not only to take account of separate individuals as "persons," but to regard certain groups of persons, or certain institutions, as if they were persons: thus we distinguish between "natural persons" and "juristical" (or "moral" or "artificial") persons. Every man from his birth to his death is a "person"; and we do not exclude "slaves" from the list of persons or regard them as chattels as the ancient law did. A condition of slavery is absolutely non-existent throughout the empire. Persons, whether natural or artificial, possess rights; but the capacity of individuals to act or exercise rights, may depend on age, sex, or mental capacity. Persons under an age fixed by law, are minors or "infants," and are under certain legal disabilities in respect to binding themselves by contract, to making a will, and so forth. And there are *degrees in minority;* for a person at a certain age may be competent to do some acts and not others—for example, there is an age of competence to contract marriage, or to take an oath as a witness,[1] or in respect of crime. The Indian Penal

[1] In the case of a *child* giving evidence, no oath or affirmation is administered, although he may be considered old enough to tell what he has witnessed, intelligently and ruthfully, and is warned by the judge to speak only the truth.

Code, *e.g.*, provides that nothing is an offence done by a child under seven years of age, nor by a child over seven and under twelve, if (as a question of fact) he has not attained "sufficient maturity of understanding to judge of the nature and consequence of his conduct" on the particular occasion.

As to *sex*, there are certain disabilities attaching to married women, as to contracts and property. In India, Hindu widows have only a life interest in their husband's estate; in some places, females other than widows, cannot inherit land, except in default of all male heirs.

Persons of *unsound mind* are legally disabled in various ways: and provision is usually made for appointing curators or guardians of their estate. In India, provision is also made for the "Court of Wards" (under special circumstances) taking charge of an estate of which the owner, though not of unsound mind, is yet unable to manage his affairs.[1]

It may be also that the *nationality* of a person may affect his rights and capacities: to gain privileges, and avoid inabilities resulting in this way, most nations have legal provisions for enabling "aliens," if they wish, to become "naturalized." But this brief allusion to the subject must suffice.

Sometimes personal rights are *affected* by some *sentence of law;* and a convict, etc., may, as such, be under certain disabilities.

I will only here notice, that these (and the following) considerations about persons, have induced some writers to classify rights of persons (and the provisions of law relating to them) according to the question whether the *person* is "normal," *i.e.*, of full age and under no disability to act, or "abnormal," *i.e.*, declines or falls off in one way or another, from the standard of full ability to act; or else is abnormal in another way, *i.e.*, is an artificial person.[2]

[1] All these disabilities depend on the principle stated at p. 24.

[2] Holland's "Jurisprudence," p. 251, 2. The learned author illustrates his meaning by a diagram, thus:—

Normal person,
Infant,
*Feme covert* (married woman),
Convict, &c.,
Lunatic, &c.,
Artificial person.

But we remarked that sometimes the law regards a body of persons (or some institution) *as if* it were a single person. And sometimes a natural person has some peculiar position which gives him the rights and duties of an artificial person.

It is not every union of two or more natural persons in one undertaking, or in holding one property, that constitutes them a "corporation" or body regarded in law *as if* it were one single person. Joint-owners or partners, or joint-creditors or debtors, may have certain peculiar rights and duties as such;[1] but they are not "juristic persons." On the other hand, a single individual may sometimes possess rights (as holder of a certain special rank, office, etc. for the time being), which place him in such a position that he has the legal characteristics of a corporation, over and above those of a natural person. Then the English lawyers use the awkward term "Corporation sole:" *e.g.*, a rector of an English parish is a Corporation sole: he exists as such, independently of the length of life of the individual A. or B. who holds the position for the time being. The Sovereign is also a "Corporation sole."

Though Companies or "firms" for trade, or societies constituted for charitable or other objects, are not "juristical" persons, merely by virtue of their association, they may *become* "legal persons" by being "incorporated" by royal charter, or by the regular procedure which is usually provided for the purpose by an Act of the Legislature. In India, any seven persons may, by fulfilling certain formalities under the Indian Companies Act of 1882, get constituted a corporation or legal person.[2]

When a number of persons, etc., are recognized as a "corporation," they are capable of holding property, and executing contracts, etc., not as joint-owners or joint-contractors, but as *one* person, the act of the whole body being indicated by a certain form, especially by the use of a "common seal."

Town corporations, municipalities,[3] local boards or councils,

[1] For example, special rules exist with reference to joint liability, and whether each man separately, can be held liable for the whole debt; or as to the right of one to demand payment of a debt due to the whole number

[2] See sects. 4, 6, 41, 235, Act VI. of 1882. Local Fund Boards in Madras are corporations (Act IV. of 1871). The corporation "dwells" or "carries on business" where its "registered office" is.

[3] In Germany and France there are many kinds of corporations resembling

Universities and Colleges, are familiar instances of corporations. So also in some cases there arises a kind of fictitious corporation in the case of what is called a *universitas bonorum*, *e.g.*, a large sum of money has been left to "pious uses" and no trustee appointed; here there are usually provisions of law as to what is to be done; and this "estate" or mass of property is regarded *as if* it were in the hands of a person. The estate of a person who dies without a will (before any one has acquired the legal power of "administering" it) and an estate of a bankrupt, are examples of this kind of "legal person."

It will be observed that artificial personality *continues*; it has a "perpetual succession:"—can go on independently of the life of the individual members who at any given moment are concerned in it. Corporations, as such, never die; they have no need therefore to make *wills* to provide for the disposition of property belonging to them. They have, as I before remarked, a "common seal," which being affixed to documents, is the formal indication that such documents emanate from the whole body: and for convenience it is usually provided that the corporation may "sue and be sued" in the name of some officer—secretary, president, registrar, or other.

Not only however are Universities and Corporations (and sometimes "estates") "legal persons," but the State itself is one; and so is the "Crown" (independently of the particular individual who wears it for the time being). The State represents the united personality of the nation, and holds property which represents the lands, buildings, stores, &c., appropriated to national objects.[1] This includes the taxes and duties paid into the Treasury, books, works of art, and special funds (*e.g.*, shares in the Suez Canal) held for the benefit of the public and to be devoted to its purposes.

It is because the State is a corporation, which never dies, that it

these: village corporations, town corporations, provincial and circle corporations, and various associations (*Genossenschaft*). In India, in some parts, there are what are called "Village Communities," in which a number of co-sharers—often connected by a common descent from one ancestor—hold the village jointly, or part of it in severalty and part jointly. But such villages do not constitute "legal persons."

[1] There may be a distinction between (public or) State property and Crown property. The former belongs to the public, the latter to the Sovereign, not as a private owner, but as Sovereign, and so cannot be disposed of at will. The subject of State property will be further alluded to in a special lecture.

is better fitted than most private or natural persons, to manage efficiently estates like forests, which take a very long time to develope. Such estates are likely to be mismanaged, or reduced to an inferior class of yield, by persons who have only a natural lifetime, and are therefore tempted to make such a use of them, as will realize an immediate profit, but does not really derive the greatest economical advantage.[1]

Though corporations or legal persons do not die, some of them may come to an end; *e.g.*, a registered company, by failure of all its component members, or by their number being reduced below a certain legal limit, may cease to exist. It is also possible that a corporation may be "disfranchised" by action of the law; or it may surrender its charter and so cease to exist.

### (C) "THINGS" REGARDED AS THE OBJECT OF RIGHTS.

Just as there are different kinds of persons—"natural" and "artificial," "normal" and "abnormal,"—so "things" are variously classified for legal purposes.

Some "things" which form the object of rights, are tangible or corporeal things;—land, houses, goods and chattels. Others are for practical purposes, reckoned as "things," though incorporeal. "A right to graze twenty cows," is not a tangible thing, but it obviously has value, and can be granted or otherwise dealt with; a copyright or a patent right may be sold and bought, bequeathed and otherwise dealt with, as much as if it was a tangible object. Hence for legal purposes the definition of "things" includes everything that can be the object of a right or an obligation.

"Things" are not only classed into "corporeal" and "incorporeal," but for various legal purposes in other ways.

Some of these classifications are of no real import, others refer to differences which are practical. For example, most laws

[1] A private person will be tempted to work an oak forest (*e.g.*) either wholly for bark, which he can sell every few years, or for coppice; he cannot afford to wait while the forest is slowly growing into timber which would benefit his great grandson. The State is under no such temptation. Hence *timber* forests (with valuable capital yielding a smaller interest) are generally held by the State (or at least by some *large* proprietor), while coppice forests (with an inferior capital but more rapid yield) are held by small proprietors.

make a distinction as to the mode in which we transfer different kinds of property. A book, a horse, a cheque, are transferred with less formality than land; for the latter may affect (indirectly) other persons besides the two or more immediately concerned in the transfer. In England this difference is expressed by a distinction between "real" and "personal" property; this is however almost wholly technical. In other laws more generally there is a practical distinction of "moveable" and "immoveable" things, the latter not only being land which is naturally immoveable, but property (like a house) which is permanently attached to land. So trees growing in the soil, are "immoveable;" and as *theft* is an offence relating to "moveable" goods and chattels, a growing tree is only the subject of theft by a special provision of law which makes the *act of severing it from the soil* an act which, in fact, converts it into moveable property. This is expressly provided for in the Indian Penal Code.

It will be observed that while all classes of things may be the subject of certain rights, all cannot be the subject of property and capable of transfer. Some things again are property and yet not capable of transfer.

The air, the open sea, and flowing water, are "*res communes omnium*"—not regarded as the property of anyone, nor capable of any contract transaction. On the other hand, navigable rivers, the sea-coast, harbours, public and military highways, churches, and cemeteries, are "property," usually in charge of the State or some public corporation, but not always saleable or convertible into money.[1]

[1] A brief note may be given about some other classifications of things Thus things may be "fungible" or infungible, *i.e.*, where one (fungible) thing so resembles another, that it may be substituted as a matter of course. Coined money is an obvious example. One sovereign is as good as another. If I lend a sovereign, I do not expect to get back the identical coin lent; but it is otherwise if I have lent a book or a picture. Things are also "principal" and "accessory"—as a cow and the milk it yields, or the calf it gives birth to; or if I have an estate on a river and the water washes up soil on the margin. Things may also be "divisible" and "indivisible" in their nature. An easement or right of user is *indivisible* in its nature. True, if A. has a grazing right for twenty cows, and his estate is divided, the right may pass so that grazing for ten cows is had by his son X. and ten by his son Y.; but the right itself is not divided, it cannot be separated into any constituent parts or elements.

## LECTURE III.

### PRINCIPLES OF THE LAW OF PERSONS (RIGHTS ARISING OUT OF DEALINGS BETWEEN PARTY AND PARTY, AND FROM EVENTS).

HAVING now finished our remarks on the meaning of terms, and on the general conception of "right," of "law," as well as of the nature of "persons" and "things," we proceed to the subjects noted in the *Conspectus*, Part II. We pass over the class (I.), rights and obligations arising out of birth, *status* in society, and out of natural or family relations, and come at once to that large and important class (II.) which concerns the rights of persons, when those persons are brought into connection with other persons, by means of some *voluntary dealing* between them, or by some (involuntary) *event* which affects them both. On this class our observations will be confined to broad principles and general features; a glance at the *Conspectus* (II.) (page 15) shows the natural divisions of the subject and the points which must successively receive attention. The first subject is:—

**(A) The parties concerned.**

As a right on one side implies an obligation on the other, in all cases of right or obligation arising from any dealing between man and man, there must be at least one person on each side.

The Roman lawyers used the term *creditor* to express the person who had the primary right, and *debitor* to express the person who had the corresponding primary obligation. We have adopted these terms in English, but confine their use to one class of dealings, where one party owes or has to pay, and the other is entitled to receive, *money*.

In many, if not in most, cases where there is a dealing between two parties, it is (as I have already mentioned) a *reciprocal* right and obligation that arises. In other words the person who has the primary right has also an obligation, and the person who has the primary obligation has also a corresponding right. For example, A. agrees with B. to paint a picture for £100: A. has the right to the picture and to B.'s services in

painting it; and B. has the obligation to paint the picture and hand it over: but reciprocally, B. has the right to the £100, and A. the obligation to pay it. But here we have the case of a dealing with one person on each side.

Sometimes there may be more than one person. Several persons (*not* being an "artificial person" or corporation) may jointly undertake to supply 1,000 tons of coal to A., or to A. with D. and E. jointly; and *vice versâ*, the recipient or recipients agree to pay at a certain rate per ton. Here it is a question to be settled by law (if not by terms of the agreement) how performance is to be had. Under the Indian Contract Act, the promisee may make any one of the joint promisors supply the whole of the coal; and they in turn could ask any one of the joint purchasers to pay the whole of the price. If this is not intended, there must be an express condition in the contract or agreement; otherwise the parties are "jointly and severally" liable as the phrase is; which means that the promisors may be come down on for the whole performance—either as a body or individually—at the option of the other side.[1] This matter is of great practical importance, as it enters into many provisions of the law of partnership.

Then, again, there may be persons only *conditionally* concerned in the dealing. A. says to B., if you (B.) lend C. £100, I (A.) will be answerable that C. repays you by a certain date; here A. has no obligation except in the event of C. not paying as agreed. (Law of Principal and Surety.) Here again it is a matter regulated by law (if not by the terms of the agreement) whether B. can at once proceed optionally against either A. or C., when failure to pay occurs; or whether he must exhaust his means of getting payment from C. (the actual debtor) before calling on A. the surety. Sect. 128 (I. C. Act) agrees with the English common law that the former is the rule, not the latter.

One person may become responsible for another, as in *guarantee* and *security*, either by express or implied agreement. But there are also cases where a person, without any express contract,

[1] And whenever one person (whether "severally" liable or not) has actually paid more than his share, he is allowed a claim at law against his fellows to "contribute," *i.e.*, to make up to him the excess (beyond his own proper share) which he has paid on their behalf. The English law is not quite the same as the Indian on the subject of joint or several liability under a contract.

becomes liable for wrong or injury caused by another; for example, the employer may be liable for injury caused by his servant in the course of his employment as such servant, and so also there is a certain responsibility of the employer for injury done *to* his servant in the course of his duty.

Unless expressly otherwise provided, the employer (and the Government or State as employer no less than private persons) may be liable for damage done by the servant in the course of his employment: (whatever remedy the employer may, in his turn, have against the servant if he has been negligent).

In Calcutta, I remember a case where some "coolies" were employed by the Secretary of State (for the Indian Department of Public Works ultimately represents the Secretary of State for India, who has control). They were carrying a hollow iron boiler on a public road, doing it so carelessly that they dropped it with a loud crash, frightening the plaintiff's horses so as to cause them to bolt, whereby the carriage was smashed and the horses so injured that they had to be killed. The Secretary of State was held liable (Calcutta High Court on reference from the Court of Small Causes).

Where a servant has a claim for injury occasioned to him *in the course of his service*, it must appear that there was want of skill, or neglect, on the master's part—*e.g.*, neglect to fence dangerous machinery in a factory; otherwise he will not be liable.

Before the dealing between two persons or more is concluded, it may be that one or other party *changes*; this may be by the act of one of them, or by some event, as the death of one of them.

By the 'act of one of the parties' we mean the *assignment* of a right (*cessio*). It may be voluntary, or by effect of law—*e.g.*, A. owes B. £10; B. voluntarily assigns this debt to C., and gives A. notice to pay to C.; B.'s right is then at an end and cannot be revived at his pleasure.[1] Supposing, on the other hand, that A. is security for B., who owes C. £10, and A. has to pay up. Here C.'s right is satisfied; but at once, and of itself, it passes over to A., so that he can compel B. to pay or recompense him for what he paid on his behalf.

[1] There are special rules about *assignment*, of which a brief and clear account is given by Dr. W. Stokes (A. I. Code, Vol. I., p. 498): no restriction exists in

Some kinds of contracts are not terminated by the death of the parties; the right of the one and the obligation of the other may pass on to their heirs. This is however not the case where the contract was a "personal" one, in the sense that the thing required *could* only be done by the particular person—*e.g.*, a contract with a particular painter to paint a portrait, or an author to write a story or a play.

### (B) Substance of the right and obligation.

This may vary, of course, according to the nature of the dealing, the act, or the event, which puts one party to such a relation to the other that a right and a corresponding duty come into existence in consequence. If there is an agreement between the parties, the "substance" (or "content"—*Inhalt*, as Dr. Olshausen calls it) of the right, is what they agree about; something to be done, or submitted to, some money to be paid, something to be delivered or supplied. If it is a matter of some wrong act of the person, or some event, giving rise to a relation between them, it is most frequently the case that the obligation consists in the *abstinence* of the other party from any act infringing the right; consequently when the right and duty are called into *active* existence, it is because some infringement has taken place, and an obligation to supply a remedy has arisen.

In some cases, as we have seen, the law will be able to enforce a positive right, by making the party obliged do the very thing itself (specific performance, in some form or shape); but in many cases of unfulfilled agreements, and in all cases of wrong, or of breach of an obligation resembling an agreement or a wrong, the form taken by obligation is, that the defaulter has *to make reparation.* The law in fact finds a *substitute* for the agreed act, or a remedy for the wrong done; in either case in the shape of money *damages.*[1] When a money debt is due and not paid

India (as in some cases it does under the English Common Law). But it should be remembered that no transfer of a claim or debt has effect on the debtor, unless he is a party to or is otherwise aware of the transfer. If A. owes C. money and C. wishes him to pay to X. instead of to himself, he must give A. notice in writing, and then A. will be liable to pay as directed.

[1] What has to be said about damages will be found at pp. 30, 31. I will only add in this place, that when a right is broken or not observed, an injury arises in one of two ways: either there is a positive injury or loss (*damnum emergens*)—something is taken away, or there is a negative loss (*lucrum cessans*)—that is, the

*interest* may be allowed by the Courts (when they have found out what the exact sum overdue is). This additional payment of *interest* on the sum overdue (*i.e.* not paid when it ought to have been) is in fact, a form of compensation to the creditor for the breach of the right to have payment at a certain date, or (if you like to put it so) a price paid to him for the use which the other has had of the money when he was no longer entitled to keep it.

### (C) How the right and obligation arise.

Such being the characteristics and legal features of every right and corresponding obligation dependent on some relation arising (by acts or events) between one man and another: how does it come to pass, that such a relation practically arises between the parties? The two chief ways are—by voluntary agreement called (I.) Contract; or by a wrongful act called (II.) Tort.[1]

## I. OF CONTRACT OBLIGATIONS.

An agreement *enforceable by law* is called a "Contract." The following elements will be found in every such contract:—

1. Two or more persons or parties capable of contracting.
2. A bilateral act, *i.e.*, an act on either side expressing the agreement, *i.e.*, what each undertakes. In exceptional cases there may be what is called an "unilateral" contract, where only one party engages to do something.
3. The subject of the promise is a matter which is (*a*) possible, (*b*) lawful (*i.e.*, not opposed to positive law or good morals) and (*c*) of a nature to produce a result legally binding and affecting the relations of the parties to each other.
4. The promise on one side constitutes a "consideration" or that which induces and compensates the promise on the other side. In general, one promise must constitute a valid consideration for the other: but in exceptional cases

injured person is prevented from obtaining a profit or benefit he would have had if no breach had occurred.

[1] Wrongful acts or torts, as already remarked, are sometimes offences as well: *e.g.*, it is a tort to slander a man, but (in some laws at any rate) it may also be a criminal offence. Adultery is a tort in English law (money damages only, however heavy); in India it is also a crime (chargeable against the man alone, under the I. P. Code, but against the woman also by some local laws).

the promise may be binding without any corresponding promise or tangible consideration.[1]

5. There *may* be a necessity for putting the agreement into some special form.

(1) There must be at least two parties: a promise to pay to one's self is not a contract.[2] There is always a *promisor* and a *promisee*. Each must be able to act: here come in those general considerations already stated, regarding "legal acts" (p. 23 ff.) about being *of age*, of sound mind (conscious), and not being expressly disqualified by law from contracting.[3]

The contract is started by one party making a *proposal*, and the other giving his *acceptance*. When "accepted," the proposal becomes a "promise." In "acceptance" there must be an unqualified, definite, assent.[4] Of course you may say, "I agree to your proposal provided you do so and so, or allow such and such a thing;" but then that requires further correspondence, and the assent of the other party. In fact, very generally, there is a *set of promises* together; but in the end there must be definite unqualified assent on either side. And it may be that if, in "accepting" with a certain condition, the other side, after a reasonable time, does not object to the condition, he will be held to have agreed to it, and so the acceptance as a whole is perfected. When a person has once made a proposal, he may be bound to adhere to it, even though he has not yet heard of its formal acceptance. But if he dispatches a revocation before he has heard of its acceptance—even though an acceptance has been put in the Post Office—he is free. There are however some

[1] Dr. Whitley Stokes refers to "consideration" as "some fact which affords a motive for the agreement," and thus includes the cases where natural affection, &c., is the motive; in such cases, however, a "solemn form" of agreement is requisite.

[2] *I.e.*, an agreement enforceable by law; the student will always bear in mind this meaning. In a case where a company had two "departments," one for insurance and one for annuities, it was held that one department could not contract with the other.

[3] As where a person of full age, but unable to manage his affairs, is put under the Court of Wards. In Calcutta a special Act was passed to make the (then) King of Oudh incapable of contracting debts, &c.

[4] The proposal is most frequently *special*, *i.e.*, addressed to a particular person or firm; but sometimes there is a *general* proposal addressed to the public—as when a man offers (by public advertisement) a reward for finding a lost article and bringing it to a certain place; here *any* one may signify acceptance by fulfilling the conditions. It is often the case that an acceptance is not unqualified, *e.g.*, A. writes to B. offering to sell a horse for £50, B. replies that he will buy it for £40. This is not an acceptance, but in reality a counter proposal, requiring a new acceptance on A.'s part.

differences in law about this matter, which I do not go into.[1] Besides formal notice of revocation, a proposal is revoked by the *lapse of time* prescribed in the proposal for its acceptance, or (if none such is prescribed) by the *lapse of a reasonable time* without any answer being sent. And it comes to an end, if the person replying to the proposal has added a condition of acceptance which the proposer refuses: and so by the death or insanity of the proposer, if this comes to the other party's knowledge before acceptance. Assent must (of course) not be the result of fraud, coercion, undue influence, or misrepresentation; for these things go against the conscious freedom of act which is requisite. There are some special conditions and consequences in law, attaching to *fraud* and *misrepresentation*, to which I do not extend my remarks.[2]

There are also several rules in detail about the *method* by which either party should make known the conditions or terms of the agreement: such rules are illustrated by the case of a person taking a ticket for carriage of himself or of goods by a railway, and there being printed conditions on the ticket or receipt-form. In general he is held to accept these conditions by taking the ticket or form; unless it appears that the conditions were so indicated that he could not have notice of them.

The parties "proposing" and "accepting," may act themselves or by an *agent*. That agent may be appointed *generally* to carry on the principal's business, or *specially*, to do a particular act or set of acts. Agency may be *implied* in some cases, but ordinarily it is express; no particular *form* being needed (unless the law requires a particular form, as it does in some cases).

The general powers of an agent and his power to act in an *emergency* beyond his specified powers (as stated in the power of attorney) are matters of the special law of the particular relation (itself a contract-relation) of "Principal and Agent." So the further question of the agent delegating his duty to a *sub-agent*. But an agent may act where the power is *implied*, as where a wife buying goods for household purposes, has

[1] See Whitley Stokes' introduction to the Indian Contract Act (A. I. Codes), Vol. I., p. 493.

[2] As when a person discovering the *misrepresentation* may insist on the other performing his part *as if* the matter had been as he (falsely) represented it to be.

*implied* authority to act for (and so bind) her husband. Where a proposal or acceptance is made by agent, there are matters for the other party to consider, such as whether the agency is still existing at the time. The agent (acting properly) is not personally liable, nor can he sue on the contract made for his principal, except in certain cases (three in number), for which see I. Cont. Act, sec. 230 ff.

(*a*) In India a promise to do an impossible thing (*i.e.*, thing impossible in itself) is void. In England there are special distinctions.[1] It should be remembered that the impossibility of keeping a promise may not always be *in the thing itself*, but may arise in consequence of some "event;" and impossibility of performing one side (*i.e.*, one part of the whole contract) does not always affect the other side, or make the *whole* contract void. Under the Indian Specific Relief Act, 1877, A. finally agrees with B. to buy a house for a *lakh* (100,000) of rupees; before B. takes possession, the house is totally destroyed by a cyclone; here it becomes impossible for A. to hand over the house, but B. may have to pay nevertheless.[2]

Quite recently an English case was reported in the papers, where a contractor had agreed with a town corporation to lay down a great extent of water piping: he tendered at a ridiculously low figure and omitted to examine the soil. He found that the work was impossible on his terms, and he had to give up after spending a good deal of money. The corporation thereon took over the work under the agreement, and he was held entitled to nothing: he chose to go into the contract with his eyes open.

(*b*) The matter must also be lawful and not contrary to morality and public policy. Thus a promise to marry a woman

[1] In England it is held that the impossibility does not necessarily take effect on the obligation of the other party, unless it is such that the Court could take it that each party meant to *imply* the possibility, and the cessation of the transaction if the thing proved impossible.

[2] Observe that it is not a matter of a completed sale, where the property has actually passed into B.'s hand, but a *contract to sell*, which is, however, in practice very similar, because B. could specifically enforce his right if A. refused; B. is, therefore, in a very strong position. The cyclone being a calamity of nature, the loss must fall on *some one*, and it must fall on the person who, so to speak, is *most* owner of the two, which under the agreement is B., though he has not yet handed over the money. It is not more hard than if the cyclone had fallen a day after B. had signed the actual sale deed. The hardship of such a case would in practice, usually be mitigated by the fact that the house was insured, and B. paying the price, would get the insurance money.

when the promisor had already a wife and the law prohibited bigamy, would be void, *i.e.*, no contract.[1] So an agreement by A. to pay B. £5 if B. gives evidence in his case. For either the evidence is to be true—in which case (under the next following head) there is no binding matter of agreement, for every one is obliged, without any agreement, to give evidence truly, when called on; or else the evidence is to be "favourable," in which case it is against the law and public morality.

And (*c*) The agreement must be such as produces a binding result on the parties: *i.e.*, must be some matter such as marriage, sale, hiring, paying money, etc., of which the law takes cognizance. A promise to dine with a man, or accompany him on a shooting excursion, is not one creating any legal relation. Nor must it be to do something that every one is bound to do without any agreement.

(4) But it was further noted that the promise of either party (*i.e.*, the lawful, possible, and legally binding promise) was the *consideration* for the contract. Thus, if A. promises to deliver goods to B., and B. promises to pay A. £500 for them, the one promise is the consideration for the other; and this forms an important element in the contract. Indeed this is the most common form of contract. In general, a contract in which there is absolutely no consideration, is void. There are, however, some exceptions, chiefly those in which the party promising, with nothing in return, is actuated by motives of affection, or family feeling; and even then a special formality is required, as will be noticed in the next paragraph. It is not, however, necessary that the "consideration" should be on any defined scale of value, because that would be impracticable. Mere forbearance, for example, may be good consideration; in itself this may appear of no value, but in fact, the granting of time may be of the utmost importance to the other party. Generally speaking, where the consideration clearly appears grossly *inadequate*, it will be considered by the Court whether it does not afford an indication of some fraud, wrong influence, or other circumstance which may entitle it to regard the contract as invalid.

Laws vary as to this. In England there are distinctions

[1] But if one party was not aware of the obstacle there might be a claim for compensation.

between agreements (or contracts) *under seal* and those *not under seal;* and there used to be some distinction as to an agreement of the kind called an *indenture*, but this does not now exist.[1] It is often provided by law that certain agreements and acts connected with them must be in writing, or in writing and registered under the law for registration of assurances. And there may be requirements about *witnesses* signing, and the final "delivery."[2]

Thus in India, an agreement in which affection, &c., is the sole consideration, is only valid if in writing and registered; and we have noted the case of a transfer of immoveable property worth Rs. 100 and more, under the I. T. Act of 1882 (p. 26). So a promise to pay a debt which is time-barred (*i.e.*, cannot be recovered by suit owing to the law of limitation) must be registered. But unless there is some express provision of the kind, no particular form is required for any contract, though it may be customary (and wise) to have a formal written document; and even if the parties *intend* to have a formal document, that will not prevent the contract being binding, if otherwise the proposal, acceptance, &c., have been fully made and assented to.

If we were now going to become regular students of law, we should have to go on to the rules which are applicable to each of the separate kinds of contract-relation known to the law; and a whole book would be required for the study of the various kinds of contract, which have their own peculiarities. I will here only give you a general idea of the scope of contract law, by showing a table of the subject matter which it contains.

There are two main divisions: "principal" contracts, which stand by themselves, as it were; and "accessory," which hang on to some other contract.

(A) "Principal" contracts—

| | |
|---|---|
| 1. Absolute alienation. | Gift—exchange.<br>Sale—assignment of rights. |
| 2. Temporary alienation or permissive use. | Loan for consumption (*i.e., where a similar quantity and kind of goods is to be returned in kind*).<br>Loan for use.<br>Letting for hire or rent. |

[1] The term "indenture" is still used, but no special character attaches to the document by reason of its being so called

[2] As putting the finger on the seal and saying, "I acknowledge this as my act and deed" (in English law—unknown in India).

3. Marriage.

4. Trusts.

5. For work and service.
   - To keep goods in deposit.
   - To do work on materials or on land, &c.
   - Carriage of goods.
   - For professional, domestic, or trade-service.
   - Agency.
   - Partnership.

6. "Negative service," *i.e.*, agreements not to do something (as, *e.g.*, to refrain from working as a doctor in certain limits of another man's practice).

7. "Aleatory" contracts.[1]
   - Wagers (not enforceable at law).
   - Annuities.
   - Insurance.
   - Marine bonds, "*respondentia*," &c.

(B) "Accessory" contracts[2]—

Contracts of guarantee, indemnity, security (by mortgage, pawn), warranty, &c.

[1] So called from *alea*, a die, because there is an element of chance. The insurance is only payable *if* the accident occurs or the house is burnt down

[2] So called because they always presuppose some other (principal) contract which is secured, guaranteed, &c

# LECTURE IV.

## THE SAME SUBJECT CONTINUED.

### (C. 2.) Obligations resembling those of Contract.

In certain cases though a person has undertaken no express *or implied* obligation[1] by way of contract, yet the law casts a certain duty or obligation on him *as if* he had contracted. It will be sufficient to indicate the case of a person supplying the necessaries of life (according to station or condition of life) to a minor; here the parent or guardian will be liable to pay (*as if* he had contracted to do so). Another case is where a sub-lessee pays rent to a landlord to save himself from being turned out when the lessee himself has failed to pay; here the sub-lessee can recover *as if* he had made a contract with the principal lessee to pay on his behalf. Under this head comes the (not uncommon) obligation to pay back money received by mistake; or to pay for services rendered in saving property, where the salvor has acted without instructions, but in the general sense that he was doing a benefit by saving the other's property. And so if *by chance*, goods are left in your charge, you are only bound to a "slight degree" of care, but will be responsible if for want even of that limited care, the goods are lost.

### (C. 3.) Of Tort.

I have already indicated that wrongful acts may so far threaten and concern the public, that they are treated as *offences* of greater or less degree and *punished*. But there are "civil wrongs,"—acts in breach of some right, which only concern the immediate parties, and are dealt with by the civil court. Many

[1] The student will not confuse the case of *implied* contract with the obligation which is the subject of this paragraph. In *implied* contract there *is* a contract, only it is not spoken or written, it is implied by the conduct of the parties. In the present case *no contract* is implied at all; but the circumstances are such that the law will enforce the obligation arising *as if* there had been a contract (*quasi*-contract).

wrongful acts are *both* torts and punishable offences. Slander or libel, trespass, acting under some personation or false pretence, injury to person or property, are common instances of tort, some of which are offences as well. Trespass is only a tort, unless it is done under certain special circumstances. In some of these cases, the wrong really causes a loss which can be estimated in money, and "substantial" damages may be claimed and awarded. In other cases the actual (pecuniary) loss is nominal, and it is more the object of the suit to get the *right* established than to recover actual compensation; the plaintiff will nevertheless be entitled to his judgment and decree, though only a *nominal* compensation is awarded. It may also be the case that a pecuniarily injurious wrong has been done, but the other side also has behaved so badly, that the Court only gives "farthing damages," as the popular phrase is; or the other party may have helped to increase the loss by his own "contributory negligence." According as the wrong is graver or less considerable, or is mitigated by the conduct of the other party, so the scale of damages awarded will rise or fall. In a bad case "exemplary" damages will be given, in another only "ordinary" damages: *e.g.*, there may be a libel which has some excuse or mitigation, or there may be one which is a gross or unprovoked and wholly unfounded, slander.

These wrongs, it will be found, all come under the following test-classification:—

(I assume that the act is without excuse or justification, for then there may be no wrong done).[1]

(*a.*) Act *intended* to cause harm and which does it.

(*b.*) Act in itself illegal (or omission of specific legal duty) which causes harm, whether *intended* to do so or *not*.

(*c.*) Any act or omission causing harm, which though *not intended* to produce any evil result, might, by exercise of due care and attention, have been known to be calculated to produce such harm.

(*d.*) In special cases, not avoiding or preventing harm which

[1] It is often the case that there is a *partial* excuse or justification only, in which case the wrong remains, but more or less mitigated; and then smaller damages will follow. Where the act is wholly excusable or justifiable, there is no wrong at all. Libel, *e.g.*, is no wrong if the matter is *true*, and the libel was not made with express malice nor unnecessarily.

the wrongdoer was bound (absolutely or conditionally) to avoid or prevent.

Such wrongful acts may affect (1.) the person merely as a human being having certain bodily and mental feelings or affections (including his honour); (2.) the person as a citizen, and having a certain estate, position, credit, *status*, &c.; (3.) the property; (4.) both person, *status*, and property. Of (1.) an example is false imprisonment, or assault, also the seduction of a daughter. Of (2.) defamation of personal character, defamation of credit (spreading false report of bankruptcy), also bringing a malicious action in Court. Of (3.) trespass on land, interference with rights of user, conversion of goods, breach of right of patent or copyright. Of (4.) nuisance, negligence.

If the wrong is done by a number of persons jointly, each one of them is *severally* liable.[1] Unlike contract obligations (under ordinary circumstances), where the wrongdoer dies, or the plaintiff, there is an end to the claim in all cases of a purely personal character. There may be statutory exceptions, *e.g.*, if *death* is caused, there may be a claim by the widow or family for compensation.

It will, finally, be remembered, that one person may be liable (in civil law) to make compensation for wrong done by his servants as such (page 40).

### (D.) How the obligation is operative.

The right and obligation that comes into existence between the parties is, in substance, to do or not to do something: it is operative in *having to be performed in a certain way*. If the obligation is passive, *e.g.*, is to respect another man's character and to abstain from publishing anything injuriously and falsely affecting it, the performance is by way of abstinence: and if there has been a non-performance, *i.e.*, a breach of the obligation, there must be *reparation* made, such as the Court will enforce.

In the case of an active obligation to do or supply something,

[1] Nor can the person held liable sue his fellows for "contribution" as he could in a contract transaction (p 39, *note*). There is "no contribution among wrongdoers."

then the performance which is the substance of the obligation, must be undertaken in a certain proper way. If it is not—if there is any failure (and the case is not one where specific performance can be sued for) there is an obligation to make reparation in the form of "damages." Hence there is something to be specially considered about the *mode of performance* in those numerous cases where there is a mutual dealing—a promise on either side. The nature, time, and mode of performance may often be indicated by the agreement itself: the thing has to be done or not done, in a certain way, at a certain place or time: and there is no question of law as to *how* or to *what extent*, or *when*. But many obligations, *e.g.*, agreements to give over property, or do work, or supply goods, very generally admit of some further question as to the *how* and *when*: and even those obligations which are to some extent definite in their terms, as to time and mode of performance, may still need to be understood with reference to certain general rules.

The performance *must be complete*, according to the nature of the act. I have to pay £100 by a certain date; I must pay the whole: the payee is not obliged to accept payments in part: so a contract to deliver one hundred beams at a certain date, is not performed (unless it is so understood by the parties) by repeatedly coming, first with one beam then with another in driblets, before and up to that date. In the case of undertaking work, repairs, building, making up goods, &c., the performance must be in a *workmanlike* manner, with reference to the persons employed: a *professed watchmaker* (*e.g.*) would be liable for clumsiness in repairing your watch and injuring it: but if you chose to give your watch to a common blacksmith to mend as well as he could, you could not demand a degree of skill which such a workman is not supposed to possess or be able to exercise. Generally speaking, all the acts to be done and conditions observed, by one party, *before* he can call on the other party to make payment (or whatever *his* obligation is), are spoken of as "conditions precedent."

It often is a question of some difficulty, under what circumstances you are entitled, owing to bad work, to give notice that you will not allow the contract to go on; unless the contract itself has provided clearly for this contingency. As to *part* per-

formance, generally speaking, you are not bound to accept it; but if you do, and if so much as has been done (before stoppage) benefits you to some extent, you must allow for the benefit you actually receive, as a "set-off" against any claim you may establish for non-fulfilment of the whole. Of course if the part of the work done is really of no value to you, that is a question of fact to be taken into consideration (*cfr.* p. 45).

The performance must be at or by, the date fixed, within usual hours of business: if no time is fixed, then a "reasonable time" must be allowed according to the nature of the act or the kind of goods or property to be delivered or supplied.[1]

As to *place:* payments of private debts are supposed to be made at the creditor's residence: the debtor must go to his creditor and pay him, not *vice versâ*. Debts to a bank, firm, &c., are payable at the *place of business*, not at private residence of members of the firm or company. As to delivery of goods, it is always stated where they are to go, or it is implied by the circumstances: otherwise the promisor must *apply to the promisee to fix a reasonable place* for delivery.

### (E.) How the obligation ceases or comes to an end.

The first and obvious consideration is that an obligation ceases when it is *completely performed* in the manner just described. But there are also several matters to be noticed. In a very large number of cases, there is a money payment to be made. We have said something about this already: we have noticed the necessity for paying the amount due, in proper time and place, and not by small instalments or part payments (unless voluntarily accepted). But perhaps the payee will not receive the sum that the other party thinks is the right amount for him to pay: the latter must then *tender* the whole amount, and if he is right (as the result of a suit, &c.) his obligation has

[1] It is practically convenient here to notice, that when *time* is a matter of condition in any business, *fractions* of a day are not counted; and a day means the "*ordinary hours of business,*" *e.g.*, A. has to pay B. £100 three days after notice; notice is given at 10 a.m. on February 3rd. He would not be bound to pay by 10 a.m. on the 6th, he would have the whole of the 6th till the usual hour of office closing; but if he offered payment, say, at nine o'clock in the evening, he would be too late.

"Month" or "year" are always understood to mean calendar months or years and no other (unless there is some express explanation added).

been satisfied and is at an end. Tender must be actual offer of present payment:[1] not the mere promise to pay or even giving a cheque—which may or may not be honoured. In the case of goods, there must be an unconditional, and proper, offer to deliver them in such manner that the other side is able to ascertain that the goods are of right kind and quality and can be made over to him then and there. In many cases (as for instance in India under the Rent Acts) provision is expressly made by law, that the amount may be deposited in Court; then there can be no doubt about the tender.

There may also be a *new agreement* or an *alteration* of terms, which, if shown, puts an end to the original obligation or part of it; the promisee may agree to take some *object* or *goods* instead of *money*, or one kind of goods in place of another; or the parties may make a new kind of agreement, as in the case of taking a bond for future payment of an existing debt. Where *alterations of contract* have taken place, it sometimes happens that the original contract was in writing and the subsequent change was verbal. Here the alteration is valid, but it must appear that *both parties* understood (which is a question of fact), that they were acting on the *altered* agreement. Where there is not a mere alteration of some of the terms, but an entirely new contract is substituted for the first, the Roman lawyers called it a *novatio*. When there is a "compromise," we have something closely analogous; for a compromise usually means agreeing to accept some part of the matter originally agreed on and letting go the rest, or agreeing to take something else in substitution.

Contracts may come to an end by what is called "*condition subsequent*"—*i.e.* (1) when a specified term is or is not fulfilled;[2] (2) when a particular event occurs; or (3) when one of the parties exercises an option reserved to him to put an end to the contract, *e.g.*, I agree to buy a house subject to the approval of

[1] Or at least an offer to pay (see I. Cont. Act, sect. 33) unconditionally, at a proper time and place, and under such conditions that the promisee (creditor) has a reasonable opportunity of ascertaining that the money is available for him (or in the case of goods, that the goods of the right sort are available). As to money payments, reference of course must be had to what is legal tender, in the matter of coin or notes.

[2] *E.g.* (1) a bond by a surety to secure good work; it is at an end when the work is properly done; or to pay a sum of money if a ship is lost, and the ship arrives safely. Or (2) to pay £100 a year to A. till her marriage takes place.

my solicitor; he does not approve; the contract is then at an end. So where a carrier promises safe transport of your goods subject to the "act of God" (*i.e.*, unavoidable natural event), or of the "Queen's enemies." If the goods were burnt by lightning or a fire purely accidental, the carrier's obligation is at an end. Or a servant agrees to serve, provided (and this may be matter of custom and general understanding when entering into the contract) that he may give a "month's warning;" his obligation ceases when he gives warning duly, and the time has elapsed.

Sometimes the obligation to perform a promise may be extinguished or modified by the fact that there is what is called a "set-off." As when though A. is under an obligation to pay B. £10, there may have been wholly other and separate transactions between them, and the result is that B. owes £10 to A. on those other transactions. It is obvious that it would often be unreasonable, that one party should be obliged to pay or tender payment on the first obligation, when the "set-off" is immediately claimable on the other transaction. Accordingly there are rules of law determining when one party can plead this set-off as a reason why he should be excused from fulfilling the other agreement. Generally, the "set-off" must be a determined sum, not one doubtful or in dispute (*e.g.*, a claim to damages not yet fixed in amount). And then you can "set off" this other claim which you have, against the payment to be made in pursuance of your obligation. The moment there is any apparent uncertainty about the "set-off," then the original performance has to be made, and the question of the counterclaim is determined by separate action.

Another way of putting an end to an obligation of contract or tort, is obvious: there may be a formal and specific "release" giving up the contract, or condoning the wrong.

We may regard *non-performance* as in some sense putting an end to the contract, and discharging one side at least. If the promisor has *refused* to do his part, or *disabled* himself from performing it, the other side may put an end to the contract between them. Or if one side has to do something and the other side *prevents him doing it*, he may elect to put an end to the whole contract.

When the Court gives *damages*, then, of course, there is an end of the original obligation—except in the case of a mere award of *interest* on a debt declared to be due (see p. 42).

One more matter remains: a contract may come to an end by reason of the promise *becoming* impossible to fulfil. We have spoken of contracts *void from the beginning* because of the agreement being to do something unlawful or impossible at the time (p. 45); but sometimes an undertaking is possible at the time, and *becomes impossible afterwards*, before the contract is fulfilled.[1] A. agrees to pay B. a thousand pounds when B. marries his daughter C. If C. dies, their agreement *becomes* impossible, and there is an end of the obligation. It is proper to repeat that there is no discharge if the impossibility is caused by the person who seeks discharge. Nor does it always happen that the impossibility of *part* of a transaction voids the whole.[2]

Lastly, an obligation may cease by *operation of law*. For example, the promisor becomes heir to the promisee; then the right and the obligation are united in the same person. Or it may be that one contract is merged in another of higher degree, security, or efficacy. In India, however, a contract by *deed* is not recognized as of greater efficacy than a "simple" contract.

*Alteration by consent* (p. 54) has already been considered; but supposing *one* party (usually in a written paper) alters or erases some of the terms, figures, &c., the contract is discharged[3] by reason of the fraud or wrong thus perpetrated.

How an obligation of the kind we are considering, can *cease* by the effect of *lapse of time*, has been already stated as matter of general principle (p. 27). A debt or other obligation not claimed within the time fixed by law, would be extinguished.

[1] There may be cases where the becoming impossible of a certain thing is the very event which the parties contemplate as giving rise to a (conditional) obligation. I do not speak of those cases. A. agrees with B. to pay £1,000 if B.'s ship *does not* return to port by 1st of August. It is ascertained that the ship was lost in a storm on 1st July; here the *impossibility* of the ship coming in is what creates A.'s liability to pay the £1,000.

[2] I have alluded to the case (in the Indian Specific Relief Act, 1877) about a man being made to pay the price of a house which he contracted to buy, but which he could not get because, before taking possession, the house had been destroyed by a cyclone; but a little consideration will show the distinction.

[3] The Indian Contract Act does not expressly say this; but probably the principle would be followed if the alteration were *material*—that is, not purely in some form or word that was of no consequence to the contract itself. Even this would be reprehensible, but would not upset the entire agreement.

# LECTURE V.

## (III.) RIGHTS (OF PERSONS) IN AND OVER THINGS.

Having disposed of the subject of rights and obligations between person and person, we now proceed to consider the rights which "persons" have in or over "things" (see p. 15). In our preliminary study of the ideas involved in certain terms, we have already considered "things" in the abstract, as they are regarded for legal purposes (p. 36 ff.). We bear in mind the distinction between tangible or "corporeal" things, and "incorporeal" things. We have also noticed that moveable property, or, as the lawyers say, "goods and chattels," may be conveniently distinguished from "immoveable" (land and things permanently attached to the soil) because of the greater facility with which transfer of the former is effected, and because of the less importance of such transfer as affecting persons other than the buyer and seller, or those immediately concerned in the transaction. We are now to consider "things" as the object of rights. Persons are connected with things, either by having what is recognized as the ownership of them (things become the *property* of persons), or by having certain rights over them which may be permanent, temporary, or conditionally temporary, these rights not being ownership rights. Hence the two main subjects of our study of the law of "Things" will be (1) Ownership, and (2) Separate rights which are not ownership.

But we can hardly make any way in discussing either branch of the subject, without making use of the term "possession." We hear of an owner being in "possession" of his estate, and also of his being still owner, though "out of possession," and so forth. And we are at once brought face to face with the important fact that "possession," as understood in law, does not coincide in meaning with the term as popularly used.[1]

[1] Perhaps for this reason (or partly so) the older English lawyers spoke of "seisin" and being "seised or disseised" of a thing, in legal phrases.

### (A.) Possession.

#### 1. *Its legal nature.*

In the first place, possession does not mean mere corporal seizure or contact. If a man carrying a bundle containing his clothes, sits down in a field by the wayside and deposits the bundle near him, he is certainly in possession of the bundle, though it does not happen to be in his hands, and he is certainly not in possession of the field, although he is in actual corporal contact with it. The important element in possession is therefore not mere physical holding or contact, but *the possibility of dealing with a thing as we like and of excluding others.* Supposing a person wishes to put me in possession of a field which he has sold me; the price is paid and the contract of sale signed: it is not necessary that I should walk over every part of the land. I simply enter upon it, the seller assents, and I am in possession. But supposing that on going to take possession I find some one already on the spot who disputes my right. I, the buyer, cannot then be said to have possession, till the opposition is overcome by consent or by force.

Just so with moveable property. I buy a coat. I need not put it on to be in possession. I am equally in possession of it if it is put in my wardrobe. So a purchaser of timber may take possession by putting his mark on the logs with the assent of the forest officer or other owner. If I am in possession of a part of a thing which consists of connected parts, I am in possession of the whole. If I am in possession of the principal I am also of the accessory (p. 37 *note*).

Nor is it necessary that possession should be continuously exercised at every moment of time; but a man *continues in possession as long as he can at any moment reproduce the physical power of dealing with the property as he pleases.* A man who goes away from his house to a place of business, is still in possession of his house, because he can at any time return to it and enter it.[1]

But possession recognised as such by the law, also requires—

[1] There is a difference as regards the possession of *wild* and *domestic* animals. I am still in possession of my house dog, though he is temporarily out in the fields; but if I have captured a deer or a fox, directly it breaks loose it ceases to be in my possession.

besides the physical power of dealing with the property, *the intention of the person to exercise the control on behalf of himself;* and this is ascertainable from the circumstances[1] of the case with which we happen to be dealing.

Under the circumstances, it often happens that a person is in full possession of property—*e.g.*, of goods in a warehouse of which he has the key, or of goods which he has a delivery warrant for; and yet the possession is not a direct actual possession. In all these cases we speak of having "constructive possession." The person is in such a position that it is "construed," or (understood) as involving legal possession.

A person may also be in possession of a thing through his representative; and the correct doctrine is that this is not a fictitious but a real legal possession.[2] "All that is necessary to possession being the power to resume physical control, and the determination to exercise that control on my own behalf, I possess the money in the pocket of my servant, or the farm in the hands of my bailiff, just as much as the ring on my finger, or the furniture of the house in which I live."

This assumes the representative to be in friendly relation; that is, that he is not acting against me: the moment he does so and means to assume control *on his own behalf*, properly speaking, my possession is gone: or it is only by special devices and provisions of law[3] that my possession is held not to be lost.

In order, therefore, to have a valid "possession by representative," the representative must be in control by consent of the principal, and that with the intent to exercise his control on behalf of the principal.[4]

[1] That possession (in a legal sense) consists not only in the physical control, but also in the determination to exercise it on one's own behalf, is also apparent if we consider how possession is transferred. Dr. Markby gives the following example (sect. 368, p. 187): Suppose that you and I are living in the same house; that you are the owner and that I am a lodger. And suppose that you, being in want of money, sell the house to me; you receive the money, and formally acknowledge me as the owner, agreeing to pay me a weekly sum for permission to you to continue to reside in the house. No external change whatever need have been taken place in our relative position; we may continue to live on precisely as before; yet there can be no doubt that I am now in legal possession of the house and that you are not.

[2] Markby, sects. 371—373.

[3] In English law, if you have received land from me on the understanding that you are to hold it on my behalf, there is hardly anything you can do that is *held legally to oust my possession.*

[4] This subject is well illustrated by the provision in the Burma Land Act

Some consequences which follow from this doctrine, such as the possession by a Court of Wards, or a guardian on behalf of a minor or lunatic, need not be entered upon.

It may be well, however, to say a few words about the relation of landlord and tenant, which is intimately connected with this matter. We have all heard in India, of "tenants with occupancy rights" and "tenants-at-will."

Under English law, and under most continental law, though there is considerable difference of opinion among experts, it is quite possible to hold that a tenant has possession as representative of the owner, and that, in spite of many express rights and remedies which might suggest that he had a legal possession on his own account. For these express rights may be all considered with reference to the tenant being in possession *of his own rights* over the land as tenant, which he may have without preventing his having representative possession of the land for his landlord. On this view, the tenant is treated, in fact, as a sort of bailiff for the owner, paying him a fixed sum out of the profits of farming, and retaining the remainder as his remuneration.[1]

This mention of the English law is not superfluous, as it cannot be denied that from time to time, it has largely affected the ideas which officials in India have entertained regarding the relation of the greater landlords in Bengal, Oudh, and the North West Provinces, to their tenants. The ancient law will not afford us any help, for the Eastern mind did not, either in its customs or its legal systems, look at things in this way at all. The relation of landlord and tenant has grown up to a great extent under the operation of our Western law. We recognised

(Act II. of 1876), sect. 2. There, possession is held to have been equally maintained if it was by a man's servant, agent, tenant, or mortgagee holding under him. Nor is the possession broken if the land is left to lie fallow in the course of husbandry, but had previously been held in the way described. So possession is maintained by the significant act of *paying the Government Land revenue* due on it, either personally or by agent, &c. This latter point is applicable everywhere in India. If it is shown that a certain person always provided for paying the revenue, even if he did *not himself* make the payment, it would go far to show that, in law, he was in possession, and that the person ostensibly in occupation had a merely *representative* possession.

[1] See Markby, sect. 338 ff., where the whole subject is discussed. I have not taken any notice in the text, of "derivative possession," because that term does not indicate a *kind* of possession, but refers to the origin of the possession, *viz.*, that it was derived from some one else. The legal possession (of whatever kind in itself) passes by transfer to the person affected by the transaction.

a proprietary right in land; and in some cases, the proprietor was a person who had, in the course of events, overridden the rights of the original landholders: these latter then came into the position which, for want of a better name, we called that of tenant.

The position of such a "tenant" soon became somewhat perplexing to the Indian lawyers. They solved the question (speaking roughly) by various "Tenant laws," which secured a permanent right of occupancy to such of the tenants as had either an originally higher position, or who had, at least by custom and general sentiment, some special claim to consideration. Thus, our solution of the question was necessarily not one based on any philosophically consistent theory, but on a desire to make some arrangement which would secure a practically valuable and lasting interest in the land to each of the different classes concerned. Consequently, in India, we must probably conclude that "tenants-at-will,"—those who have nothing particular in their favour, and are only on the land by lease or contract, have possession as representatives; and with regard to those who have rights of occupancy, and cannot be ejected, they may still be in representative possession to some extent; because they *pay rent* to some one: and that person's possession continues in the act of receiving his rent, to say nothing of his paying the Government revenue.

Sir W. Markby[1] observes that, on the whole, while our law shows, on the one hand, a decided inclination to treat the tenant as having only a representative possession on behalf of the owner, on the other hand, his "right of occupancy" is clearly a right which is available against all the world, and not merely as by way of consent on the part of the owner; in which case his possession is that of a right of continued user, not a mere contract-right. His possession then is, as I said, to some extent representative, and to some extent not: we cannot help the conflict of the two positions which arises out of the circumstances.

### 2. *What "things" are capable of possession.*

Returning to the general subject of possession, it may next be remarked that as actual physical prehension is not a necessary

[1] Markby, sect. 389, pp. 198, 199.

element in possession as understood in law, it may be possible to be "in possession" of things not actually tangible.

It is not, however, to all "incorporeal" rights that the idea of possession can be extended. We must not press the extension beyond what is fair; we can, however, speak reasonably enough of a person as in possession of a "right of way" or of a "water-course;" and *hence possession extends generally to those rights which are called "servitudes" such as the "forest rights"* of which we shall have much to learn hereafter.[1]

There is a peculiarity connected with possession in such cases which must be noticed. A person who has a right to cut firewood cannot be engaged in cutting it every moment of his life. A man is not perpetually going to and fro over the land which is subject to his right of way. For months together in a dry season, no water may flow off my land on to my neighbours'. Such rights are spoken of by lawyers, owing to this circumstance, as "discontinuous" rights. Although it is easy to admit that such a right is still in possession, though it may not have been actually exercised for several days, or weeks or even months, at the same time we feel that, if, say, for several years, the right-holder had not once crossed my field, or during more than one winter (when firewood was most needed) had not once taken a stick from the forest, there might be very considerable doubt about his having maintained actual possession of the right. It is always a question of fact, whether the right has been maintained.[2] But the Indian law has settled the matter as far as may be, by the rule that, if the right has been intermitted for two years *next before* bringing a suit to establish it, the right would be lost.[3] An *intermission* is not the same thing as an *interruption*. Under the Indian Limitation Act, an interruption is the act of some person against the right; it is, in fact, an indication that the right is disputed; and if an interruption is suffered or acquiesced in, for a whole year, the right is

[1] I need hardly quote authorities for the position that a *right* can be in *possession*. It is admitted in the French and German as well as English text-books.

[2] The English law has a distinction between rights of common and easements, in this respect, which has not been maintained in the Indian Act. In England an intermission at any rate of a right of common, is no bar to a proof of a general user and possession for the required period (Williams, p. 178).

[3] Act XV. of 1877, sect. 26: see illustration *b*.

lost.[1] The period after which an uninterrupted use gives a right, is twenty years under section 26 of the Indian Limitation Act (and so sect. 15 of the Easements Act, 1882, where this is in force).

There also remains one other point which I should notice, because *joint-ownership* is so very common in India. I allude to the nature of *possession in the case of co-proprietors.* The maxim of English lawyers is that if there be two equal co-owners "each is possessed of the whole and the half." Each owner of the undivided property has access to and control over, every part of the property; and he exercises that control not only on behalf of himself alone, but partly in respect of his own share, and partly as representative of the co-owner.

It is well known that amongst Hindus, ancestral property is virtually owned by the whole family. A Hindu dies leaving three sons; these three succeed jointly. The family is not considered as a corporation (p. 34), and no member of the family can assert that any part of the family property belongs *exclusively* to himself; but while he has a certain control over the whole, he is also in legal "possession" (as above explained) of his own right or share. The "village community" of which we hear so much in India (*i.e.*, where there is a body of co-sharing owners), is in fact, an organised patriarchal society consisting of such co-owners.

It only remains to be added, that joint possession and co-ownership must not be confounded with the possession or ownership of "artificial persons," that is, of a body of persons *whom the law regards as one person.* Where property belongs to the State, to a registered "company," or a "corporation," the law regards it as held by *one* legal owner. The legal possession of property is then in the one *artificial person*, not in the individual members, as it is in co-ownership.

### 3. *Loss of possession.*

Then, as to being put out of possession; *every act by which physical control is completely destroyed, puts a man out of possession:* not so where the loss of control is incomplete. I leave my axe hidden in a wood, knowing where it is and intending to

[1] The Act explains that an "interruption" occurs where the soil-owner or some third person obstructs the exercise of the right, and the obstruction is submitted to (being known) for a whole year.

return and work with it next day; it is not out of my possession. I drop my ring into the river; it is completely out of my possession.

4. *Legal consequence of possession.*

These general ideas involved in the term "possession" as used by lawyers, are, you observe, independent of any question of the possession being rightful or wrongful. Possession by itself is a fact; and its elements have to be understood. And as we shall further explain hereafter, the law will only allow *de facto* possession to be disturbed by its own authorized action. It will respect possession as actually existing, and will compel others to respect it, until such time as some one proves that the possession is wrongful; and then the law will (in executing its judgment) put an end to the wrongful possession and put in a rightful possessor instead.

What has been said about Possession is only a very brief outline of a subject which in all its details and bearings is a very intricate one. Indeed, starting with the history of the Roman law on the subject, more than one elaborate treatise on "Possession" has been written.[1]

**(B) Ownership—Property.**

Possession is, ultimately, always enjoyed by an *owner:* but a person may be *owner* of property and yet be out of *possession* (I here mean entirely out of possession, not merely out of personal possession while still retaining it constructively or through a representative): but in the end possession always accompanies ownership. At the same time the right of *ownership* clearly involves more than a bare legal *possession.* And this leads us to consider what the nature of ownership or right of property over "things" is, how it is acquired, how it may be lost, and what are its legal features.

*Modes of acquisition.*

It will be convenient to speak first of the ways in which ownership may be acquired; and I will at once enumerate the modes of acquisition and then explain them.

[1] Savigny's well-known work on Possession has been translated by Sir Erskine Perry. A modern contribution to the literature of the subject is the elaborate essay by Pollock and Wright, published at Oxford.

I. Prescription;
II. By accession to the principal thing already owned.
III. By transfer in one form or another.

(I.) *Prescription.*

The most obvious starting-point is that suggested by our latest observations. The simple taking possession, or *occupatio*, was probably in early times, the most usual method by which property originated. People found what they wanted—a bit of land, a tree to cut down, or whatever it might be, either unoccupied and free, or else in the hands of an enemy from which it was taken by force. When once various objects had been taken in this way, and the land seized on by tribes (who perhaps had a customary method of regulating appropriation within their own borders), an idea of exclusive right began to develop itself. As time went on, lands were cleared and houses built, and a large class of (moveable) "goods and chattels" were accumulated in different hands. The sentiment of society gradually grew up, that even though the original act of taking possession, long ago, might have been doubtful, a subsequent peaceable, open, possession as owner, ought to be respected. The Roman lawyers, with their usual neatness of expression and clearness of thought, established the rule that after a fixed period—shorter in the case of goods and chattels, longer in the case of lands and houses—possession, however originating, could no longer be disturbed; a good title of ownership was acquired. Taking possession (*occupatio*), when followed by open and peaceable enjoyment was called *usucapio;* and when this had gone on long enough (according to the legally prescribed term), it was held to have ripened into a "just title" by *prescription.*

The Roman lawyers belonged to a period when the primeval stage of society had long passed by; but still it was possible to take possession of unowned things, or (still oftener) to take (or have) possession of them under certain defects of title, which time should cure. They required accordingly, that to gain a full title by *prescription*, the enjoyment of the property must have been what we call *adverse, i.e.*, with the intention of holding it as your own, *adversely* to any other opposing interests or claims: and they expressed their meaning by saying that the sort of possession which would (in time) give a title, was to be

"*nec vi, nec clam, nec precario*;" it was to be peaceable,—not maintained by force against possibly better entitled claimants; not held secretly or by fraud (so that any possible just claimants were unaware that their claims were denied or defrauded); nor precariously—*i.e.*, by such uncertain means, that one might say the holder was in possession to-day and out of it to-morrow. These conditions may appear to go against what I said before—that possession, *however originating*, might in time become perfected. But both are correct; for though violent seizure (I do not speak of seizure in war),[1] or possession by fraud, would prevent the period necessary for prescription from beginning to run until the fraud became known, or the violent seizure manifest, still if the parties entitled to object on these grounds, stood by and made no claim, and let the period run out, the original defects were cured, and a possession that was, ever since, open, peaceable, and settled, would be sufficient.

At the present day, all kinds of useful "things"—moveable and immoveable—have been so fully and so long the subject of legal property, that there is but rarely an opportunity of taking *possession for the first time* of unowned goods. Even in colonies or in outlying parts of India, no one can now seize on a piece of land, however apparently waste or unowned; because there are laws which already determine the general question of the right to "waste lands." But still, the rule of *possession*, peaceable and open, giving a "prescriptive" title after a period of years fixed by law, is by no means without its use.[2] It may apply in the case of lands or houses, not because they can be seized, as in a state of nature, but because there may have been some *defect* in the title, or some circumstance which compels the present holder to rely on possession only as his basis.

[1] The Roman lawyers held that property of an enemy was "*res nullius*"—no man's goods, and so could be seized by the successful combatant. War, they said, restored things to a state of nature (in which nothing originally had a specific owner), and so awaited "*occupation*" by the successful party.

[2] The laws prescribing how many years' possession shall upon a claim to moveable, or immoveable property or an (incorporeal) right, are called Acts or Statutes of Limitation (in India Act XV. of 1877). In England the lawyers were slow to acknowledge that a *title* was acquired by the lapse of years. They said that the lapse took away the possibility of a remedy, but theoretically left an original title untouched. No limitation law existed before the reign of James I. In India, the fiction of the English lawyers has never been admitted. The law there expressly declares that on the period of prescription being complete, the possible right of any one not in possession, is *lost*, and not merely his remedy barred.

I recollect a case in India which will illustrate this. There was a considerable house property owned by A., who died having made a will leaving the estate to D. A. had only one (known) relative, a remote connection, C. As it happened, D. took possession under the will, and C. allowed the legal period to elapse without attempting to claim as natural heir; C.'s right was accordingly lost. Afterwards it turned out that A.'s will in favour of D. was absolutely void, so that D. (in possession) had no title. C. hearing of this, instantly commenced a series of dealings with a view of successfully ousting D. and getting possession himself—if he could do so without provoking legal interference (of which we shall presently speak). Here you will observe everything depended on *possession;* as long as D. had open, settled, peaceable possession, no one could interfere with him; no violent attempt of C. to turn him out would have been allowed. But if C. could have managed to get possession without violence, fraud, &c., then *his* possession would be respected, till D. could prove his title, and that (as his will was void) he could not do.

It is with reference to this important influence of possession, that the Civil Law (Specific Relief Act) will always give a summary remedy against dispossession. As soon as the mere fact of actual, present, possession is shown, the Court will maintain (or restore) it, and insist on the opponent filing a suit to prove his rights, and not disturbing the possession otherwise. And as sometimes these questions of *possession* give rise to violent quarrels, the Criminal Procedure law also enables a magistrate to interfere to maintain possession and prevent any violence.[1]

[1] The XIIth Chapter of the Criminal Procedure Code, sec. 145—148, is devoted to the subject of disputed possession; for the strong feelings which often manifest themselves in disputes about land and houses, may result in violence: it is therefore desirable to provide a procedure by which steps can be summarily taken to prevent disturbance. And the plan is this: without entering on any question of right, the magistrate proceeds to ascertain *the fact of possession*, and makes a formal order that the possession he finds to exist, shall not be disturbed till it is so in due course of law. If this possession is not ascertainable, or if neither claimant is really in possession, he may "attach" the property until a competent court has settled the right to it. In cases in which dispossession has been effected by use of criminal force and the dispossessed person obtains a conviction on a complaint of the use of force, the magistrate can at the same time order the sufferer to be restored to his possession. A claim to a right of way or other right of that kind is decided on the principle that such a right may be virtually "in possession;" and if the magistrate finds that the way or water-course, or whatever it is, is, as a fact, "open to the use" of the public or any person, or class of persons (*i.e.*, they are in possession of the user), he maintains them in the use, by making an order that no person can stop them, till the question is lawfully decided. As a right of this kind is not exercised *at every*

There are however, even in modern times, occasionally cases, chiefly of moveable things, where really they are "*res nullius*," no man's goods, and therefore ownership may be legally acquired by simply taking possession. A gem at the bottom of the sea, if taken up by some means, becomes the property of the finder; and so valuable stone or coral on the open shore or fish in the open sea: (in these cases there may of course be some express law of fishery, or other law governing the acquisition of such objects). Property also may become ownerless by being "derelict," *i.e.*, abandoned or thrown away; anyone may then take it who likes. In India, in Forest administration, we have often to deal with customs of long standing by which certain pieces of timber are "waif"—*i.e.*, have got into rivers used for floating timber, unmarked, and not in charge of any person. Usually the Forest Act will be found to regulate the collection of such pieces and their disposal; but some rules allow the villagers on the river brink to take freely small pieces of a specified size (which are of small value), and which if brought to a timber depot would be of little use and no owner could be proved.

In the case of a *lost* article (*i.e.*, unintentionally out of possession) there may be special police or other laws about what is to be done with a view to finding the owner:[1] but putting that aside, and looking only to the question of ownership—the finder is held to have a good title against everyone but the true owner. The well-known English case (*Armoury* v. *Delamire*), about the jeweller who removed a valuable stone from a ring, was also concerned with this principle; for the plaintiff happened to be a person whose only title to the ring was that of a *finder:* yet he was allowed to sue, and to recover the fullest damage against the fraudulent defendant, because he had a good title to the ring as finder of apparently unowned goods; at any rate until some one appeared (within the proper limit) to prove a previous title.

*moment of time* (p. 62), it is necessary to fix an artificial limit, and say that it will not be held to be in possession unless it has been exercised within three months before the date of the enquiry, or at the last season (before the complaint) at which the right was capable of being exercised, if such is the nature of the right. This short term is fixed only for the purposes of the summary remedy we are considering.

[1] See the Lectures on Criminal Law—head "Criminal Misappropriation."

I may mention that what is called "treasure trove," that is, finding valuable things *hidden* in the earth, or in something permanently attached to the earth (*e.g.*, a bricked-up niche in a wall), is governed by a special law.[1] And so the right to metals and mines in the earth. These are not held to be "no man's goods:" they belong to the owner of the surface; in some cases to the Crown. The latter is the law in India, except in cases where the grant of ownership implies or expresses otherwise.[2]

## (II.) *Accession.*

"Accession" is referred to as an origin of ownership, depending on the principle that a "thing" and its "accessory" (p. 37, *note*) are regarded as one in law. If you own a tree, you own all the fruit that grows on it; or owning a cow, you own also its calf: and so with any kind of increase or improvement of the original thing. A very common instance of accession, arises in India in connection with the di-alluvial action of rivers: —the soil washed up on the river front of an estate, ordinarily belongs to the estate; not so a separate island in the midst of the stream. There are many customs about alluvial accretions which are allowed to be in force under the law (which is still contained in Reg. XI. of 1825).

But there are also cases where the "accession" to the original, is not by natural growth, but by the direct action of man, as where a tree is planted on another man's soil, or a wall or a house erected. Here the *general* maxim is "*quidquid plantatur solo, solo cedit*,"—whatever is planted in or affixed to the soil goes with the soil;[3] but the application of such a general principle would depend on the circumstances of the particular case. A most important consideration would be the question of good faith and knowledge. Practically, questions of this sort arise when a building is erected on land the title to which is in dispute; or when the party seeing building, &c., going on, does not take notice, or warn the builder of his own claim to the site.

[1] In India by Act VI. of 1878.

[2] This is more fully explained in a later Lecture (Part III.—Lect. on Government Property).

[3] But this is not admitted in all systems of law, at least not without considerable modification.

For if you build on my ground, and I stand by and do not warn or prohibit you, then I may be taken to consent, and the house will consequently be yours; though, by some systems of law, I should be entitled to compensation for the ground (so in the Prussian law). In India, rent would probably be allowed to the land-owner for the use of the ground in such a case.

But, supposing you, being in possession of the land and believing it to be yours, build upon it, and afterwards I succeed in proving a title to the land. Here on the principle stated, the house is mine, because the land is; but you, the builder, would be entitled to recover the value of the building, or at least be allowed to pull down the house and remove the materials I may add that in all these cases the precise facts of the case have to be considered; and in India the fact of the house being of mud ("kachchá"), or of masonry ("pakká"), would often affect the precise relief which a court would grant [1].

A similar case may occur in planting. As soon as trees or plants have taken root, they are held, by all systems of law, to form part of the estate. In the Prussian law, if the planter have sown or planted in good faith, and the land-owner is satisfied to keep the trees or plants,—in other words, recognizes that he has been benefited by the act, he has to pay the actual expenses of planting, and the trees become his; should he not want the trees (as if he wish to plough up the land), then he is not bound to compensate, but the owner may still take away the trees, if it is possible to do so without injury to the estate. This seems fair and equitable.

Connected with this principle is the case of *mixing* goods; if they *cannot* be separated, the question as to the ownership of the whole, and on whom the loss would fall, would depend on whether the mixing or confusion was rightful or wrongful. Another instance is what the Roman lawyers called "*specificatio*" —or making a new article out of raw materials. A skilful artist might mould a statuette worth several pounds, out of a lump of clay hardly worth a penny. And supposing the artist had wrongfully taken the clay which belonged to another person: that is an extreme case; because the clay would be of such trifling value that no one would make a claim about it; but the same thing might happen, if a valuable log of mahogany were

[1] There is a leading case about this in the High Court of Calcutta, reported in the Weekly Reporter, Volume VI., p. 228 (also in the Supplementary Volume to the Bengal Law Reports (Full Bench, p. 595); see also Panjáb Record for 1878, Case (Civil) No. 53).

cut up into some (still more valuable) carved furniture. The Roman lawyers had some difference of opinion: it would depend on the equity of the case what should be done; certainly in the instance first given, the maker of the statuette would not be made to break up the image and restore the clay itself: he would be required only to pay the full value of the material.

### *Rights of Chase and Fishery.*

These rights may be regarded, as in analogy with "accessory" things. The animals and birds which are wild, or at least are partly wild, and are produced on the estate in a manner other than that in which domestic animals and cattle and poultry are produced,—are regarded not as "no man's goods" to be taken by the first comer, but are usually protected by some kind of laws: so that "poaching" becomes an offence. "Fisheries" are of the same nature.

In India and the colonies, the state of the country has not as yet demanded any special attention to rights of chase, but fishery rights have been more regulated. In Burma, the different rivers and streams are divided into "fisheries," over which certain rights are defined by a special Act of the Legislature. Custom goes for much in these matters.[1] Game laws in India are hardly known. But a beginning has been made by reserving the right in State forests; and in Municipalities, rules may be enforced making it penal to offer for sale game birds (as defined in a special Act) during a "close season" fixed by rule. State forests are usually protected by a power to the Local Government to make rules regulating hunting and fishing within their limits. These provisions are only locally of service; but they effect this much good—that where such forests exist, the birds and animals have a refuge which in time they come to know.

In the continental text-books, the right of chase—*droit de chasse*, *Jagdrecht*—occupies a much larger space; the whole subject is minutely regulated by law, as to the rights of the estate owner (or the *lessee* of his chase-rights); as to the question of damages to the estate (or its cultivation) in the course of hunting; as to

[1] It has been held that in Bengal the landlord (or Zamíndar) does not necessarily own the fishery-right on every pond or lake, etc. on his estate: there must be apparent some fact, such as recognition of a special right at the Permanent Settlement.

the protection of forest land in connection with hunting; as to the officers and servants employed as gamekeepers, huntsmen, &c.

In England, the whole subject is dependent on certain game laws.[1] I am not sure whether any law exists regulating deer-hunting in Scotland.

### (III.) *Transfer.*

In modern times, as I have stated, most property has long been in possession, having commenced with a mere "occupation," and then gone on to a continuous possession which has ripened by "prescription" into a good title (*usucapio*). *Now*, therefore, property in any one's hand is most often traceable in its origin, to some act of *transfer*. A.'s land was sold to him, or given by free gift, or bequeathed by the will of the last owner. Transfers are *temporary* or *permanent*. There may be the *lease* of land or houses; but that belongs to another class of rights over things, as does also the case of a mortgage (with possession) which is at an end when the money is repaid. The mortgage only becomes absolute (or converted into a permanent transfer, when it is "foreclosed," *i.e.*, on failure of the debtor to pay.

Transfer of houses or land is usually a matter of more form than transfer of goods and chattels; it may be that written instruments are required, or entry in the public registers, or both. In India, in provinces where the "Transfer of Property Act, 1882," is in force, you cannot transfer a house or land worth Rs. 100, or more, without a document registered. Transfer (as we have mentioned) of lands, &c., affects other persons besides the immediate parties, or may do so; as where B. has to pay rent, and C., the original owner and rent-taker, transfers his right to D.; B. must know for certain who is legally entitled to receive the rent. The ownership also may require to be known with reference to tax collection, and in India especially, with reference to the land revenue payable.

### *Nature and Features of Ownership.*

The right of property acquired in these various ways, includes in its complete or perfect form the *totality* of all conceivable

[1] Formerly, when extensive royal forests existed in England, nearly the whole of the law (which was very strict) related to the preservation of the king's deer: these laws have become obsolete with the disforesting of the areas, or by specific repeal.

rights to use and enjoy the property. The Roman lawyers neatly expressed this idea by saying that a man had the *usus*—the use or advantage, whatever it was, or by improvement might be made to be; *fructus*, all the fruits, accessory products, and derivable profits; the *abusus*, *i.e.*, the right to consume, change or destroy the substance; and, lastly, the *vindicatio*, *i.e.*, every conceivable power of alienation, transfer, letting out to others, and also maintaining every form of legal action necessary to assert or preserve the right.

As to the *extent* or *physical limits* of the right, it is not merely to the surface, but everything up to the sky and down to the centre of the earth; unless, indeed (as is often the case), particular systems of law make any restriction, as where mines under the surface do *not* belong to the owner but to the Crown.

Dr. Olshausen, describing the Prussian law, does not acknowledge the English law maxim of ownership extending to the "upper air," but limits it to the height of ordinary buildings, or to which telegraph poles or wires are carried, *i.e.*, not to regions accessible only by a balloon.

As regards limits towards the sea or a river, the property extends to the water's edge; the bed of the river is not included in the estate. But where a river changes its course and leaves an old bed, it is a matter of local custom whether the estates (on either side) divide between them the land once occupied by the river bed, or how it is disposed of.

It is specially important to understand the nature of ownership, because, although a number of rights, uses, and enjoyments (which can be separately considered), are united in the *owner*, ownership is not a *mere* aggregate of such rights; it is a right *per se*. And so, when we compare a full ownership to a bundle of sticks, from which you may withdraw one or more and hand them over to other persons, the metaphor is to some extent misleading; for you might suppose that if a sufficient number of the rights were separately enjoyed by other persons, so few of the "sticks"—or none at all—might remain, that the "owner's" residue would be *nil* or next to it. But this is not the case; it is quite possible to transfer to another person or several persons, almost the whole of the profits, uses, and advantages, so that only the "bare ownership" remains; and

yet the remaining right may be a *true ownership*, while all the separate enjoyments would only be *rights of user* or the usufruct (of which presently). So long as the *thing* itself is not lost or separated from the person of incidence (the owner), no matter how many uses, benefits, and produce rights are alienated, his *ownership* remains; and we shall see, later on, what an important practical bearing this consideration has.

The *ownership* itself is in fact something specific and different from the separate rights of user or enjoyment, which may remain with the owner or pass into other hands. "Ownership" is, therefore, a right which in itself is *indivisible*,[1] exclusive, and permanent, and lawful. It may reside in one person (whether an individual or an artificial person), or it may reside in a joint body. In the latter case no one of the joint owners can do anything affecting the whole property without the concurrence of the others. And even if one of the number should sell or mortgage his individual share, the purchaser could not act separately as regards the share, without getting partition. And there are often special laws and customs affecting joint ownership, such as that certain parts of the property can never be partitioned, or that a right of pre-emption (p. 78), resides in the other joint-owners, *i.e.*, a right to have "the first refusal" before a share can be sold to an outsider.

When the "owner" is left with the whole of the uses, powers, and capacities that attach or belong to the property owned, according to its nature, he is said to be a full and unrestricted owner; if he is left only with the bare ownership (*nuda proprietas*), or with the ownership and only *some* of the attendant uses and faculties, he is said to have a *restricted* or limited ownership.[2]

This form of right—ownership limited by the rights of other persons, may arise in the case of any kind of immoveable property, *i.e.*, land or houses. It becomes of especial importance in the case of lands covered with forest. Indeed, it is by no means always that the owner of a house, or a farm, or a forest,

[1] This will not be misunderstood. From the totality of the enjoyments, uses, etc. which are often aggregated in the hands of the owner, portions may be divided off and given to others: but the ownership itself is a thing that can not be divided into any separate parts; the right cannot be analysed into separable constituents.

[2] The Roman lawyers called the *full* ownership—ownership *plus* all its surroundings—a *dominium*: restricted ownership was *dominium minus plenum*.

has a complete or unlimited right in the estate; much more commonly his right will be found *restricted* in some way, even slightly, by rights belonging to other people.[1] How these separate rights come to be detached from the owner and attached to other persons, we shall consider presently.

*Restrictions on the right of ownership.*

But there may be also an artificial restriction or ownership, which is expressly created by law, when the *general* good, or the convenience of the locality (or a large portion of it), requires. And this may extend either to limiting the mode of using and managing the property, or it may extend to depriving the owner of it altogether. In such cases we find all civilized nations permitting the State authority to declare that any piece of land or immoveable property is required for a public purpose; and when that is done, the private owner must give up the property, subject of course to a fair compensation. Different laws have different provisions as to exactly how the compensation is to be ascertained, whether by jury or arbitrators, or a judge with assessors; the law lays down what matters may be considered, and what may not be, in estimating value.[2]

In the special case of forest property, it may be that restriction is called for, not by absolute expropriation, but simply by leaving the owner free to a certain extent in the enjoyment of his property, but restricted in the mode, so as to effect certain objects. Supposing, for instance, that a forest is situated on a mountain slope, and if it ceased to exist there might be danger of slips of earth, rolling stones, or snow, injuring the fields, houses, and public roads below; or the forest formed a protecting mass which prevented injurious winds or shifting sands from invading the estates beyond; or was situated so as to regulate the flow of water in torrents or streams; here the forest owner may by law be compelled (i.) never to change his forest into fields, *i.e.*, uproot or destroy the forest growth as such; and (ii.) to utilize and work it in such a way as never to clear large

[1] I do not think it ought to be considered a *restriction* on full property where the owner has merely to avoid creating a nuisance, poisoning the air, fouling water, and the like.

[2] In India, Act X of 1870 is the law regulating this matter. Something more is said about it in a later Lecture.

spaces at once, or diminish the general effectiveness of the mass; and (iii.) the *partition* and dismemberment of forests (leading always to their destruction) may be prohibited. These principles are fully recognized in what I may call old established forest countries.[1]

In new countries like India and the colonies, such views, reasonable as they are, may take a long time in making themselves felt by the Legislature, or by the general sense of the official classes, or by the public; owing to ignorance, and to prejudice caused by the fear of the unpopularity of restrictive measures, and the dislike of interfering with private property: and there may be a tendency in such cases, to insist on the total acquisition by the State, of the forest, which is generally too expensive and too great a burden on the public exchequer, a burden which there is really no reason to impose. The only case in which total expropriation would seem necessary, is where a forest growth is greatly to be desired, and yet none now exists, and it is necessary to take up an area of waste or other land and stock it with tree growth. Here the private owner could hardly be expected to do the work, which had better be undertaken by the State; for the State can afford to wait for a return to its expenditure, or perhaps be satisfied with indirect benefits to the country at large, by way of return.

Both kinds of limitation—(i.) that implied in the right to deprive an owner of his rights (of course on suitable compensation) when his land, &c., is required for a *public use*, (ii.) that implied in the compulsion so to manage property as not to injure the whole country, or the immediate neighbours—are dependent on two legal maxims everywhere acknowledged—*salus populi suprema lex*, the advantage of the public in general is the first law; and *sic utere tuo ut alienum non lædas*, so use your own property as that you do not injure other people.

[1] In Prussia, for example, in the general law, or Allegemeines Landrecht, there is a section (I. 8, §§ 33—101) headed, "Legal limitations for the sake of the public welfare" (*Gesetzlichen Einschrankungen zum Besten des gemeines Wesens*), and (Id. §§ 102—189) "in the interests of neighbours" (*zum Besten des Nachbarn*). The former, it will be observed, are imposed, and can only be taken away, by law. The latter, though imposed or allowed by law, may be removed by the agreement of the parties. If my immediate neighbour *agrees* to submit to the risk or the damage, well and good; he may (assuming, of course, that no one else but the neighbour who agrees is concerned). But where there is danger to the entire district or to the public, no agreement can enable the owner to act otherwise than as the law directs. In 1876 a law was passed dealing with forests that have a protective character; and as recently as 1881, a special law regulated the *partitum* of jointly owned forests. On this subject Dr. Danckelmann has published (Berlin, 1882) an instructive *brochure*.

# LECTURE VI.

## (C.) RIGHTS BELONGING TO ONE PARTY EXISTING OVER THE PROPERTY OF ANOTHER.

### (I.) *General nature of such rights.*

We have already taken notice of the fact that though the right of ownership in itself has a distinct legal existence, the owner naturally possesses a combination of powers over his estate and has various rights of enjoyment and use of it; so that it is possible to separate some one or more of those rights and let it (or them) be enjoyed by another person; the ownership remaining all the while,—restricted as to its accessories, but unchanged in character. This substantive right of ownership over the whole property may subsist, even though *all* the practical and present enjoyment of it is vested in some other person. In the "99 years' lease" so common in England, for that long period, the lessee has the use and enjoyment and profit of the land, can build on it, &c., and has only to pay a ground-rent; but still, he is not owner of the land, and therefore he may not *destroy* it. Of this we shall speak hereafter. At present we confine attention to the fact that there are numerous cases where the ownership right over the "thing" resides in one person, and certain rights over the same "thing" reside in another.

### *Special rights—Lease—Mortgage—Pre-emption.*

Such rights may be of several kinds. Under this class we might include all rights over things which are transferred by a contract or agreement with the owner; as in the case of a lease of land to a tenant, whereby the owner *agrees* to part with the use and enjoyment of the land for a term, on a certain consideration: or where (as so often in India) a tenant right exists, which owes its origin, not to agreement with the land-owner, but to custom, to circumstances, and to legal enactment; and which is consequently a right in perpetuity. Another familiar example is where an owner *mortgages* his land, *i.e.*, gives his

land as *security* to his creditor.[1] With regard to *mortgage*, I may just mention that there are two principal kinds: in one the owner retains the land (or house) in his own possession (simple mortgage or hypothecation); but under the liability to have it sold by the creditor (mortgagee) if the money is not paid by a certain date. In the other, the owner gives over the possession and enjoyment to the mortgagee (usufructuary mortgage); in the latter case the profits of the land are (usually) taken by the mortgagee in lieu of interest on the money due.[2] A pawn or pledge conveys rights of a similar kind, only that we apply this term in the case of moveable property. "Mortgage" always refers to land or other immoveable property.

Sometimes there are special rights like "*emphyteusis*," and the "usufruct," where the owner gives over permanently, or for a long time, *everything* except the bare right of ownership and the reversion to his family if the right becomes extinguished; and (usually) there is some fixed annual rent-payment.

"Pre-emption" is also a special right existing in some countries, whereby, in the event of the owner selling the property, a neighbour (or some other person as defined by law or custom) has a right to buy it in preference to any other purchaser. Such a right arises only when the owner sells (and in rarer cases, by custom, when he makes a mortgage with possession).[3]

I do not propose to say anything more about these special rights as they rarely (in practice) concern a forest officer's duty.

[1] For example, Dr. Olshausen, having regard both to moveable and immoveable things, treats under this head:—
Mortgage (*Pfandrecht*).
Pledge (*Faustpfand*, "*pignus*").
Hypothecation (*Hypothek*).
Special mortgages to Lending Associations (*Kredit Anstalt*).
Right of retention (*e.g.*, right of an artificer to keep an article till he is paid for the labour bestowed in making or repairing it, &c.).
Pre-emption (*Vorkaufsrecht*).
Usufruct (*Niessbrauch*) (including use of official dwellings and lands allowed to be cultivated by public servants as part of their remuneration (*Dienst-Landereien*)).
Loan and hire, lease, &c. (*Sachmiethe, Pacht, &c.*).

[2] Sometimes an account has to be kept of all receipts (the lekhá-mukhí mortgage of India), so that after satisfying the interest (at an agreed rate) on the debt, any surplus goes to reduce the principal debt itself.

[3] In those parts of India where there are "village communities," this right is a matter of custom, and is regulated in some detail. Its object originally was to keep strangers out of the circle of the community. A similar right often exists in towns to secure the privacy of family dwellings, &c. When once the *sale* has been announced, the vendor has no right to defeat the pre-emptor by saying, "Well, then, I will not sell at all."

*Rights of user—Easements—Servitudes.*

There is, however, another group of rights belonging to the same class, which it is essential for us to understand; I refer to those *permanent* rights by which *some specific use of some enjoyment of produce of an estate is broken off (so to speak) from the ownership, and comes into the hands of another party:* sometimes it is a matter of some mere abstention on the part of the owner, which may be advantageous (or even indispensable) to the other party. The English law divides such rights into two classes: (1) "easements," always existing for the advantage of (or in favour of) some *specific property or estate* (house or land) over *another* property or estate: and the theory is, that what is strictly an easement, is a "privilege without profit," *i.e.*, it takes nothing in the way of produce or substance. Such "easements" are, for example, the right not to have your light obstructed;[1] not to have your flow of water obstructed; or to have the support of the neighbouring soil or walls; or to have your house-beams resting on your neighbour's wall (so that he could never pull down the wall); or to have the dripping from your roof received by your neighbour; or to let your drainage water flow into his gutter, &c. (2) Where the right consists in *getting something*, as a right to pasture, to cut grass, to feed pigs on acorns, to cut turf, or dig for sand, gravel, &c., that right is called a "*profit à prendre*" (or "right of common"). The distinction is not however in practice logically or perfectly carried out.[2] In the elaborate Indian "Easements" Code passed (but not applied to all provinces) in 1882, the distinction was abandoned, as it already had been in the Limitation Act (XV. of 1877), which is of general application. "Easement" is defined to include both

[1] It is this right that is claimed when you see (in street improvements, for instance) notices stuck up that certain windows are "ancient lights;" that means that the windows have been so long in existence that the owner has (or claims) a prescriptive right or easement to have the light free, and that the builder will not be able to erect any new buildings that would darken or interfere with the windows—at any rate, without paying a round sum in compensation.

[2] In English law, for instance, a right to get coal from a pit is a right of common, but to get water from a neighbour's well is an easement. It is not clear why this should be, unless water is regarded as the air and light, not as a vendible product. In this law there is some further distinction between easement and common-rights, as to their origin, and as to their legal inherence in certain persons or tenures. This I do not go into.

classes of rights; and *I propose so to use the term;* it is in general equivalent to the Latin *servitus*, the French *droit d'usage*, or the German *Grundgerechtigkeit*.

It is well however to bear in mind that there is a *natural* division of these rights into two classes. For example, one class is indispensable to the proper use or enjoyment of another property: the other class is concerned, indeed, with the benefit of another *property* (or sometimes another *person*), but is not so connected as to be necessary to the very existence or use of the property.[1] Obviously if I have a house, and cannot get a *right of way* so as to approach it either on foot or horseback, or by a carriage or cart drive (as the case may be); if my neighbour is allowed to dig on his land, so that my walls cannot be kept from falling down; if I cannot get the drainage water from the roof or from the soil away from my premises; if I cannot get light and air from my windows;—my house would become practically useless to me; its very existence as a house would be endangered. Rights of this nature are therefore naturally distinguishable, and are often spoken of as "easements of necessity." On the other hand it may be a great advantage to my house (or to me as a person) that I have a right to obtain firewood in the neighbouring forest, or to graze my cows in it, or to dig turf, loam, or sand; but however beneficial and even necessary, those things may be, it cannot be said that my house or my farm could not exist *as* a house or *as* a farm, without them, as was the case in the former class. This practical distinction we shall find to be of use when we come to consider the manner in which rights of both classes are dealt with where they affect forest-estates. It is also to some extent a natural division to distinguish easements which *take nothing* from the estate, and those which *take something* in the way of produce. The German writers[2] distinguish these by the terms *Gebrauchsrechte* (*uti*) and *Nutzungsrechte* (*frui*).

Rights of user are often "easements of necessity" in the legal

[1] This is made very clear in sections 13, 14 of the Ind. Easements Act, 1882.

[2] As it is neatly expressed by Danckelmann, "Der blosse *Gebrauch* schliesst die Aneignung von Bestandtheilen oder Erzeugnissen aus; die *Nutzung* schliesst dieselbe ein" (Vol. I., p. 3). (A right of *use* excludes any appropriation of parts or products of the estate, a produce-right includes it.)

sense. Produce-rights never are; although they may be practically indispensable under particular local circumstances.

The rights we are considering have already been stated to be portions, or subordinate elements, of the enjoyment of any property, which have become detached from the main right,—from the *body of the ownership* right, and are vested in persons other than the owner. Thus in their nature they are always limited rights; and for this there is also another reason which will presently appear.

As the existence of such a right is (to whatever extent) something that is a burden, or that diminishes the value or the unrestricted enjoyment of the property over which it extends, the Roman lawyers called such rights "*servitutes*" (anglicised into "*servitudes*") because, so to speak, the property was made to "serve" the purposes of someone other than the owner: and so also, the estate which bore the burden, was called the "*servient*" estate. This phrase is convenient and must be remembered—the property which has to *bear the right* (whatever its nature) is the "servient" property.

The obligation or duty of the "servient" estate is always passive, *i.e.*, the estate has to *submit* to something, never actively to do anything for the other party. But regarded from the point of view of that other party—the right-holder, the easement may be either *negative* or *positive*. The easement may consist in a right to have free passage for drainage water over a neighbour's land (*i.e.*, the servient estate must *not* obstruct the flow); in having the servient house *not* built up so as to shut out light and air; or the servient land *not* dug away so as to cause the right-holder's walls, &c., to fall down: these are *passive* or *negative* rights. Or it may be *active* or *positive*; as where the right-holder is entitled to go on to the servient land (which has to *submit* to those acts) and drive his carts, or cattle over it, or *take some produce*, as cutting wood, grazing cattle, digging gravel, &c., all of which are enjoyments implying some action on his part.

The servitude may also be "real" or "personal." The right may be enjoyed by a *neighbouring estate* or *property*, *i.e.*, may be exercised by whoever is, for the time being, the owner of that property, and *as* such owner. In that case the lawyers call

it a "real servitude:" and the estate which holds the right is the "dominant" estate, as the other which bears or suffers it is the "servient" estate.

The dominant estate may be a house, farm, hospital, church-building: or it may be an "institution," such as a school, an University, or a Commune; and the right is exercised by the owners of that estate for the time being, as such. If the right is held by an individual (or a corporation) as such, and *independently* of that individual or corporation being owner of any estate, then it is called a "personal" servitude.

Some rights are necessarily or in their nature, "real" rights: for instance, a right not to have windows obstructed or darkened, *can* only exist in favour of an estate—a house which has windows: a right of way implies an estate of some kind to which the way leads.[1] In some systems of law—and this should be noted—*forest rights, i.e.*, easements of grazing and wood-cutting, &c., are *always* real rights: they never exist merely in favour of persons as such, but for the benefit of particular houses, farms, workshops, or some hospital, college, or other institution. In German text-books they will be found so defined.[2]

But in India, and I daresay it will be the same in some colonies, we are unable to draw the line so. We have indeed cases where there is an *estate* which is "dominant," or holds the right: in Burma, Buddhist monasteries as such (and independent of the particular persons residing in them for the time) sometimes have rights to bamboos, to grazing, &c. And in India it is often the case that a certain "village" (*i.e.*, in the Indian sense—a group of landholders forming in some sense or other, a community) claims a right of grazing, &c. Here it is

[1] I have heard of a right of an individual to cross a certain field giving him a short cut to the parish church; this he might have independently of his having any property adjoining. But in this case the church stands (at least by analogy) in the place of the "estate" which had to be reached by the pathway.

[2] *E.g.*, in Danckelmann's work, a forest right is defined to be "a real right attaching to a specific estate (*einem bestimmten Grundstucke*) to some beneficial user of a forest belonging to another owner, which owner has the obligation to submit to something, or to abstain from doing something, for the benefit of the dominant estate, which something, he would otherwise, in virtue of his ownership, be free not to submit to, or not to abstain from" (but see Danckelmann, Vol. I, p. 8, at the bottom). It will be remembered that where the members of a Commune, &c., enjoy the use of their own communal forest, this is not a case of easement at all, the members are enjoying a share of their own jointly owned property. But a Commune may have rights over a forest belonging to the State, &c., then it is a dominant estate.

more questionable whether the village is a "dominant" estate. Possibly it is so if the entire area is owned by a co-sharing body, and is regarded as a unit (of tenure) for revenue purposes; but not otherwise. We do not, however, refuse (in principle) to recognise *personal* forest-rights or easements.

In English law, the *personal* "easement" (or right of common as it would be called) is recognised as a "right in gross," and it cannot exist by local custom: this distinction is not however important to us.[1] Where a right or easement is "real" it is said to be "appendant" or "appurtenant"[2] to a certain (dominant) estate.

It will be observed that some, at any rate, of these separate rights or easements, are valuable "things;" they are in fact reckoned among "incorporeal" things. And they may be "in possession" at any rate by a fair analogical extension of terms. For their "possession" is governed by the same principles as those we have stated (p. 58 ff). It is not any mere physical act, as such, that constitutes possession of an easement. I may walk down A.'s garden a dozen times, without the physical act constituting in any sense a possession of a right of way: but if A. writes me a document informing me that he grants me and my heirs for ever, a right of way over a certain field, and he removes a padlock or hands me the key, I am in (constructive) possession of the right of way, as effectually as if I walked over the path. So if without any traceable permission or grant, the inhabitants of house X. have for generations past, used a certain way, openly, peaceably, and as of right, they may be in possession of a right of way, though they do not actually pass over the land for some weeks together.

Some rights are in their nature what we call "discontinuous."[3] I may have a right to let my drainage water flow over A.'s field: but in a dry year, for months together not a drop of water may actually flow. I may have a right to cut firewood, but I do not keep cutting it every day and every hour of the day. Here it

[1] Williams (Rights of Common), p. 194.

[2] The Indian Act has adopted the term "appendant." There is historically a technical distinction between these two terms: but this we need not go into (Williams, p. 31). Those who are interested in the history of the technical distinction between "appendant" and "appurtenant" may be referred to Professor Vinogradoff's "Villeinage in England" (Oxford, 1892, p. 265).

[3] See note on p. 85.

is not so easy to say whether such a right has been kept "in possession:" the test is, has the physical possibility of enjoying the right and the intention to enjoy it, for itself, remained in the dominant, and been submitted to by the servient, estate? The nature of the right, and all the circumstances of the case, must be looked to. Generally speaking the matter is expressly provided for by law, *e.g.*, under the Indian Limitation Act of 1877, if all exercise of a right has been *intermitted* for *two years* before suit, the easement may be lost. Or if an *interruption* (*i.e.*, an act from the other side,—the servient owner resisting) is known to the right-holder and submitted to for *one year*, the right may be lost (p. 62).

In its nature, also, the easement must be to do something *lawful*. You could not acquire a right to clip the Queen's coin, no matter how long you had been doing so. You cannot have a right to *destroy* or waste the servient property, *e.g.*, to set fire to a forest.[1] It is for this reason that an *unlimited* right is not recognised. You could not have a right to graze so many cattle that the whole soil would be turned into a desert; nor to cut so many trees, or so much wood, that natural reproduction would be impossible. But the question of *limitation* of rights, with reference to the claims of the *right-holder* on the one side and the *servient-owner's* right of enjoying his estate on the other, is so important, that I must recur to it hereafter in more detail when we come to study the Forest law. Here I will only note the general principle that the right can never (from its nature) be co-extensive with the ownership, and can, therefore, never extend to swallowing up the whole; for that would be, in fact, attacking the substance of the estate itself, and rendering it practically useless to the owner. As no easement (of produce) can be *unlimited*, it may be said that the question of extent or quantity —how much material, what number of cattle, and so forth—is involved in the nature of the easement. This depends on the terms of the grant or other title: and in the large class of cases where

[1] In some forest countries hill tribes are accustomed to cultivate by cutting down the forest vegetation, burning it when dry, and dibbling in seed with the ashes. After a crop or two has been raised, the place is exhausted, and they move off to repeat the process elsewhere. We shall examine this practice under the head of Forest law; here I only note the fact that, while recognising a certain necessity to allow such a practice under local circumstances, in India the Acts refuse to acknowledge any *right* or *easement* as arising from it.

the right is prescriptive, *i.e.*, has long existed openly and peaceably, but without any (traceable) original grant, the law makes express provision for determining these matters, usually on the basis of the actual needs or requirements of the right-holder. It will be more convenient to reserve all details on the subject till we come to study the law regarding forest rights, and the provision made for their definition.

Easements must be the means of some benefit or advantage (even pleasure or convenience may suffice) to the right-holder; "*servitus quia nihil interest non valet*" (a servitude or easement that is of no use to anyone is not recognized).

Once more, the right or easement is always to a continuing benefit.[1] A right (say by purchase of a ticket) to take a load of grass from the forest on a specific occasion, is not a "servitude;" there must be a permanent right which can always be exercised from time to time as required. *Servitutes perpetuas causas debere habent.*

And if the right is perpetual, so the servient estate must be *maintained*, by the avoidance of all destructive and unnecessary acts on the part of the right-holder, and by proper management on the part of the servient estate-holder. This is in fact another ground for the rule that easements must not only be of a lawful and non-destructive nature in themselves, but also that they must be exercised in such a reasonable way as not to destroy the servient property. They must also be so exercised as to spare the estate from any unnecessary loss; obviously there are two parties or interests to be considered; while the easement holder has his reasonable and fair enjoyment, the owner must not be restricted unduly in *his* enjoyment, or prevented from working his estate in a businesslike manner, according to the established principles of management. Here I will only remark, that taking produce which grows again, is not regarded as "attacking the substance" of the servient estate: nor is a

[1] The student will not confuse between "continu*ous*" and "continu*ing*." All rights (easements) are "continuing," *i.e.*, not mere single acts not to be repeated, but permanent, habitually enjoyed, rights: at the same time, they may be "discontinuous" (pp. 62, 83), *i.e.*, not exercised at every moment of time. A "continu*ing*" right to flow of water is not continu*ous*, when the weather is dry and no rain falls. And so a right to cut firewood is only exercised from time to time as occasion requires; but unless it is lost by intermission for such a time that the law regards it as at an end, it is a continu*ing* right.

moderate taking of sand, gravel, or turf: for though these things are not exactly "reproduced," still, practically, their ordinary removal does no harm.

Easements are not capable of being divided or partitioned; except, indeed, where either the dominant or servient estate is partitioned, and by consent, or by requirement of law, some adjustment is made; but then the partition must be so effected that neither is the burden of the right on the parts of the servient estate increased, nor the right itself increased or multiplied. And where the right is, in its nature, confined to certain parts of the estate, it cannot, by partition, be extended to others.[1] A real easement can never be detached from the dominant estate and separately transferred; but if the dominant estate is itself transferred, the easement may pass with it. Personal easements are never allowed to be transferable, but this is by express provision of law.

### *Origin of Easements.*

It often happens—indeed most commonly in Europe—that the easement originated in some grant or charter, emanating from royal or baronial authority in the days when the forests were in the hands of great lords. In Germany and France, forest rights are closely connected with the historical development of property, and often represent the outcome of arrangements consequent on the dissolution of the feudal system.

But in any country, rights may also have been exercised for generations past—no one can tell exactly how or when the exercise began—but it has always been going on, in a certain uniform and determinable way, and in favour of a certain estate, or the holder of a certain ancient tenement or the inhabitants of a certain village.

[1] Servitudes are in their nature impartible or indivisible because they belong to the dominant estate as a whole, and are over the servient estate as a whole. If either estate (alone) is partitioned, the right in theory remains unaltered. In the one case, the several co-sharers have collectively the same right as before; in the other, the easement still subsists over all the divided parts of the servient estate. In practice and for convenience, some adjustment of the exercise would probably be made, but as far as the theory of legal right is concerned, there is no alteration. With most rights, it is, however, generally held, in case of transfer of the estate, that they pass only to the particular lot which contains the buildings, houses, &c., for which the right exists. But this must be understood within limits, because it might be desirable to apportion the total enjoyment or produce of the right, equitably, to the different parts of the divided (dominant) estate (Danckelmann, Vol. II., pp. 4—5).

In England, very often easements arose simply out of the constitution of the old manorial estates; certain classes of landholders were understood (as part of the system) to have corresponding "common rights." But speaking generally of acts of user and produce-taking which have been openly and peaceably enjoyed as of right, it is allowed by law, that after a certain number of years, the right becomes fixed by *prescription*, exactly on the same principles as a title to ownership is acquired; and the conditions are the same (see p. 65). The enjoyment must have been open, peaceable, and as of right. In the Indian law (Act XV. of 1877), such enjoyment for twenty years gives a right, and the Easements Act, 1882, is similar. But this is held not to be an exhaustive provision; that is to say, the High Courts hold, that though the law declares rights to be acquired on certain terms, it does not say that they cannot be acquired (or cannot exist) in any other way: and a right (on this principle) would be decreed, when the whole circumstances were such as to make the recognition obviously equitable and in consistence with the fundamental principles of law.

### *Loss or Extinction of Easements.*

As easements may be gained by prescription, they, naturally, may be lost by the same means: they may be lost (as already stated) by the right-holder *submitting* to an interruption for one year, or by his *intermitting* all use and claim for two years. They may be extinguished by voluntary abandonment and release, or where, by law, they are exchanged, commuted, or compensated. They may be extinguished (under the Forest law) when after every effort to find them out, they are not claimed or brought to notice (*i.e.*, in the process of regularly constituting a State Forest).

There is also a possible case of extinction where the right (*e.g.*) of grazing on an estate exposed to river action, is lost, because the land is washed away. In India land may be re-formed on the same spot after a greater or less interval. I do not undertake to determine whether the Courts would hold that in such a case the right revived, or not: if it were a case of temporary submergence, of course there would be no difficulty, because the interruption of the right would be wholly involuntary and beyond control; but where the land entirely disappeared, and a new "accession" was, perhaps long after, formed in the same place, it might be held that the right did not revive.

This brings to a close our first division, the study of some elementary principles of the law (Civil—Private) of Persons and Things. There are, as I have stated, a great many heads of law, and a still greater number of points of detail, of which we have not even made mention. All the law that we have considered, moreover, belongs to what is called the *Substantive* Law. We have not (and that intentionally) said anything about the *Adjective* Law—Procedure, Evidence, etc. In the case of our next part, it will be desirable to notice both the Substantive Law and the Adjective or Procedure Law. This next part deals briefly with the Criminal Law and Procedure. Finally we can go on to the Forest law, which we shall naturally consider in more detail: this last branch of study will involve many matters connected both with the Law of Persons and Things, and also with the Law of Crimes. That is why we end with Forest Law, and begin with the others.

END OF PART I.

# PART II.

## CRIMINAL LAW AND PROCEDURE.

*CONSPECTUS.*

### CRIMINAL LAW. (I.) SUBSTANTIVE.

INTRODUCTORY REMARKS on the LAW as "GENERAL," "SPECIAL," or "LOCAL."

DEFINITION OF TERMS (with remarks on certain terms not defined in the I. P. C.).

ACT OR OMISSION INVOLVED IN OFFENCES.—Certain peculiarities noted—Offence partly by act, partly by omission—Offence by several acts, each act being itself an offence—Alternative offences—Act done with a certain intention, resulting in something different from what was intended.

GENERAL EXCEPTIONS:—*i.e.*, special circumstances under which acts which otherwise might be offences, are exempted from criminality.

(1.) Acts done by State command; by Judicial authority; or with legal justification.
(2.) By accident.
(3.) Act without competent understanding, &c.
(4.) Harm done with design to prevent other harm.
(5.) Acts by consent.
(6 & 7.) Acts done for benefit of a person with, or without, consent.
(8.) Acts on compulsion or under duress. (Note on offences under stress of necessity.)
(9.) Acts in defence of person or property.

THE GENERAL CLASSIFICATION OF OFFENCES AND THEIR NATURE.

I. **Against the State or the Community at large** (the Crown—the Army and Navy—the Public tranquillity

(unlawful assemblies, riot, &c.)—the Public service (by and against public servants)—against Public justice—with reference to Coin and Stamps, Weights and Measures—the Public health, safety and convenience—Public morals and decency—against Religion).

II. **Against the Human Body**:—

(A) Murder—Culpable homicide.
(B) Connected with birth (*e.g.*, causing miscarriage).
(C) Hurt (simple and grievous).
(D) Wrongful restraint and confinement.
(E) Assault and Criminal force.
(F) Kidnapping, abduction, &c.
(G) Rape and unnatural offences.

III. **Against Property**:—

(a) Wrongful obtaining of property.
- Theft.—Extortion.—Robbery.
- Dacoity.
- Criminal misappropriation.
- Criminal breach of trust.
- Receiving stolen property.
- Cheating.

(b) Injury to property.
- Mischief (of many varieties).
- Criminal trespass (house trespass and its varieties; housebreaking).

IV. **Offences relating to Documents and Trade Marks** (False Document—Forgery, &c.).

V. **Breach of Contract** (where **Criminal**).

VI. **Offences against Marriage.**

VII. **Defamation of Character.**

VIII. **Intimidation and Insult.**

**Abetment** of Offences.
**Attempts** to commit Offences.
**Punishments.**
**Some special Incidents of Punishment.**
**Limitation of Time for Prosecution.**
**Remarks on Facts to be shewn in Prosecution.**

# LECTURE VII.

## A GENERAL VIEW OF THE LAW OF CRIMES (WITH SPECIAL REFERENCE TO THE INDIAN PENAL CODE).

WE have now to leave the subject of *Civil* law—the law of contracts, obligations, and of civil wrongs; the law of property and of easements—and approach a new subject which belongs to the domain (not of *private*, but) of *public* law.

Our attention has, during the last Lectures, been so directed to the question of rights of persons over things, that it may be necessary to recall to our memory, some of those considerations regarding rights and obligations in general, which were introduced in one of the first Lectures. I may, therefore, repeat that when the law desires to enforce any duty, *i.e.*, any obligation to act or to abstain from acting, it arms itself with a *sanction*, which term the lawyers use to indicate the penalty, or the unpleasant consequences, threatened by law against disobedience to its commands (p. 19). Hence, when any infringement of a legal right has occurred, the person affected can, by a proper action before the public Courts or judicial authorities, invoke the application of the legal remedy—set the sanction in operation. In the case of the Criminal law which we are now to consider, the "sanction" is always easy to perceive, as it consists in the penalty which is directly provided for every breach of the law.

Among the duties or obligations imposed by law, we noticed a class of cases which arose between person and person as the consequence of some *wrong* done by one against the other. But there are many wrongful acts which do not merely affect the individual injured; they threaten the peace and well-being of society at large; they spread alarm; and would, if allowed to go unnoticed, ultimately throw civil life into confusion and render mercantile business (not to say life and property in general) so insecure, that trade and industry would suffer. There are also wrongful acts, which must be repressed because they injure the public, or the public revenue or other property, though they

may not produce any tangible ill-effects to any particular individual. Such is the case where a man sets fire to a forest belonging to the State, or where he unlawfully distils spirits, or smuggles dutiable goods. When this public character or influence attaches to a wrongful act, it is no longer regarded as a matter of private law—as merely a case for damages (or other redress) to the individual; it is a matter of public law; the act is punished by the State, and it is called a "*crime*," an "*offence*," a "*felony*," a "*misdemeanour*," a "*delict*," or by some other name which indicates that it comes under the criminal law; the different names being adopted either to indicate some peculiarity in the nature of the act, or in general to distinguish the greater or less degree of gravity or criminality which the law attaches to it. We shall revert to this distinction hereafter; at present it is enough to notice it as a fact. It may be that *both* the Civil remedy and the Criminal are applicable. The person injured may have a civil action for the tort; but in many cases the law will insist on the wrongdoer being punished as well. And in grave cases, as we shall see, the law will not allow the injured person to come to any terms with the offender; if the offence, for example, is one of a class which the police can take direct cognizance of, and the case is brought to trial before the magistrate, the prosecution *must* go on, and "compounding" the offence is not, as a rule, allowed. This, however, is a matter of Criminal Procedure, and will come before us at a later stage.

Accordingly it becomes of great importance to know what *acts* or what *omissions* are regarded as having this public character, so that they are *punishable* as offences; it is the function of *Criminal Law* to define and regulate the whole subject. And if we reflect but for a moment, on the law regarding crimes or offences, it will be obvious there is a very considerable extent, as well as variety, of subject-matter to be dealt with. In the first place, there is the main subject of defining what acts or omissions constitute offences and what do not, (or, in other words, what acts will be repressed by public authority and what will be left to the Civil Courts to give satisfaction merely between man and man), and what amount, degree, and kind of punishment shall be threatened as legally imposable

in the event of a conviction. This is the *Substantive* Criminal Law, the law defining offences and imposing definite penalties. But there must obviously be Courts of law specially constituted and adapted for dealing with offences; and the powers of these Courts must be regulated, and their procedure provided. And there is even an earlier stage than that; before you can try the offender, he must be detected and arrested, or, at any rate, summoned before the magistrate: hence provision has to be made for authorizing and for regulating the action of the police in summoning or arresting offenders; and this too will involve the procedure regarding *search* when offenders are in hiding, or when property connected with theft and other crimes, is concealed and has to be discovered. Then again, it is more desirable to *prevent* offences, if possible, than to punish them; so the law may enact various rules which tend to prevent the occurrence of offences; such are legal provisions enabling the magistrate or the police to keep evil-doers and notorious criminals under supervision, to take security for keeping the peace, and the like. These matters (and there are many others also) form the subjects of the *Adjective* Criminal Law, the law of Criminal Procedure. Here, then, we have one main division for our lectures on Criminal Law; we will take the Substantive law first, and the Adjective or Procedure law afterwards.

I expressly take the Indian Codes as the basis of our study, because in the third part of our course it will be Indian Forest law that we shall have chiefly to consider. But though it is there convenient to take the Indian Criminal Law as our standard, it will be found that a great deal of what is said is matter of general rule or principle, and will therefore satisfy the requirements of the general student.

The Criminal Law is either General, Special, or Local. In the "general" law (in India, in the Indian Penal Code), all acts and omissions which the law declares to be punishable offences are included, if they are of a general character; *e.g.*, offences against the State, against the life and person, against property, including mercantile frauds, offences against the currency, and other offences relating to general life in its usual course. It would be impossible to include in one Code all the infringements of special laws such as are made penal; for instance, the

laws relating to the Post Office, Telegraph, Railways, Military Cantonments, Excise, Gambling, Cattle-disease, Hackney-carriages, &c. Penalties are separately prescribed for offences against the provisions of the several Acts relating to these subjects; and such laws are called "Special" laws.[1] The Forest Acts, which also provide certain penalties peculiar to themselves, are "Special" laws. In some districts and provinces, the peculiar conditions of life require certain laws which are applicable only to those localities and not elsewhere. Such laws are "Local laws." It may be that a law is both special and local: for example, the Hazára Forest Regulation is both "Special" and Local, as it only applies to the district called Hazára in the Panjáb.[2]

But with reference to this separation of the provisions declaring and punishing offences, it is important to note that when the General law (Penal Code) makes provisions universally applicable, as *e.g.*, on the subject of *punishment*, then it contains an express definition of the term "offence." Under these clauses the term "offence," which in itself means *an act or an omission punishable by law*, is made (I. P. C., sec. 40) to include, in some cases, only offences against the Code, in others, *all* offences punishable by any law, and in other cases to include the latter only when they are of sufficient magnitude to be threatened with imprisonment for not less than *six months* (with or without fine).

Thus all the provisions of the *General law* relating to "imprisonment" (I. P. C., secs. 64—67), apply to *all* offences both in the Code and in Special and Local laws. Sec. 70, which allows the award of "solitary confinement" as part of the sentence of imprisonment, applies expressly *only* to offences under the Code.[3] Again, in sec. 109, "abetment" of offences is dealt with, and here, by effect of the definition, this means *any* offence. And so in sec. 214, when punishment is threatened against giving a gift to screen a person who has committed

[1] It is a matter of convenience, and of policy, what subjects are reserved to special Acts. For example, "Gambling" (*i.e.*, of a public character) *might* have been included in the General Code, but it was thought better to have the provisions relating to the subject collected in a separate Act

[2] A very complete list of Indian Special and Local laws will be found in the *Anglo-Indian Codes*, Vol I., p. 7 ff

[3] That is, in effect, to say that no offences but those in the General Law, are of such gravity (or possess such other character) that *solitary confinement* (as a severe form of punishment) is considered necessary for them.

"an offence," it means *any* offence. On the other hand, in sec. 176, when the intentional omission to *give information* about "an offence" is made punishable, this applies only to offences under the Code, or to the more *serious* of the offences under Special and Local laws, *viz.*, those which carry a penalty of at least six months' imprisonment.

In practice no kind of difficulty occurs in dealing with the differences between offences under the Code and those under separate laws.

And it should be observed that when it happens that an offence is expressly declared under a Special or Local law, it will also be punishable under the Code, if the facts show that it also comes under the terms of the Code. But a person cannot be punished for the same offence twice, *i.e.*, first under one law and then under the other.[1]

### Definition of Terms.

Such being the law under which certain acts or omissions are constituted offences, it is further obvious that in every case, it is needed to describe accurately what the offence is, and what precisely are the circumstances which make an act (or an omission) an offence. It would be very hard if persons were liable to punishment, perhaps involving a long term of confinement, a heavy fine, or even the deprivation of life, or liberty for the whole term of life, unless it were made perfectly clear under what precise circumstances the penalty became due. For this purpose it is necessary, not only to define what the different offences consist in,—what are their essential elements, but also to employ the words and terms used in defining crimes, in an uniform and exact manner. For this purpose a number of words and terms require to be defined. You will recollect to have found "definition clauses" in almost every Act and Regulation, whether Criminal or Civil; but in the penal law such definitions are exceptionally important. Let us then, before considering the kinds of acts which are "offences," first take note of the words and terms commonly made use of in Criminal Law, both General and Special.

[1] To prevent mistakes, this principle is expressly declared in the Forest Act.

Chapter II. (sec. 7, etc.) of the I. Penal Code contains these explanations of terms, and should be read. Some of the definitions seem obvious enough; but then prisoners are cunning, and advocates, not to speak of magistrates, are sometimes captious; and loopholes must not be left. For this reason, it is explained that when the pronoun "he" is used, it is intended to include "she" where the agent is a woman (unless the context requires otherwise), and so the "man," "woman," includes a male or female human being of *any* age.

Other terms really require explanation: such, for example, as "Judge," "Court of Justice," and "Public servant." It is equally important also to attach definite meanings to terms which necessarily occur in describing offences connected with property, valuable securities and merchandise:—such as causing "wrongful loss," or "wrongful gain," acting "dishonestly" or "fraudulently." The terms "counterfeit," "document," "valuable security" are also explained. In some cases the definition is only given in the section which directly declares the offence, *e.g.* "cheating" (sec. 415) and "criminal force" (sec. 350)—a definition which more properly would be in the General Chapter.

It is perhaps an omission that no definition is given of the terms "corruptly," "malicious," "immoral," "negligent," "rash," etc. I will not attempt to define these terms, but remark that "corrupt" is applied to all acts which are with intent to gain some advantage inconsistent with official duty or the rights of others. "Malice" has been used to include cases where the motive is not only to do harm but to do harm for its own sake. In the Bombay High Court it has been defined as "conscious violation of the law, to the prejudice of a person." "Malignant" implies the extremity of malice. "Negligence," says Dr. Whitley Stokes, "imports an acting without consciousness that an illegal or mischievous effect will follow, and without such attention to the nature or probable consequences of the act, as a prudent man ordinarily bestows in acting in his own concerns."[1]

Only one other definition I will mention specifically, because the Code continually speaks of a person being "legally bound"

[1] Ang.-Ind. Codes, pp. 11, 12.

to do a thing—or a thing being "illegal;" this is defined (sec. 43) to mean that everything is "illegal" which is—

(1) an offence under the Code;

(2) prohibited by law;

(3) or furnishes ground for a civil action.

And a person is "legally bound to do" what it would be illega in him to omit.

*Acts and Omissions.*

But besides these various definitions, there are some matters of direct importance concerning *acts*, which require notice: I have already pointed out that an offence may be either an *act* prohibited or an *omission* to do something that is commanded. And it may be that both act and omission occur. Sec. 36 accordingly states that where the causing of a certain effect (or the attempt to cause it) by an act or omission is an offence, it is to be understood that causing it partly by an act, partly by an omission, is also the same offence.

The illustration given, is of murder by a jailor who has a prisoner lawfully in his keeping and is bound by law to feed him; here if death were caused partly by a wound (act) and partly by withholding food (omission), the jailor would be equally guilty of murder.

Again, it may be that an offence (being under the Code, or under any special or local law) is made up of parts, *i.e.* of several acts combined, and any one of the parts by itself is an offence; the offender may be guilty of all, but (unless expressly provided) is not liable to punishment for more than one. I mention this because it is often practically important: the case referred to is where *the several acts are mixed up together*, or "graduate towards, are essential to, and culminate in, a single distinct offence;" the offender is to be punished for one offence only. A person is often *charged* with several offences,—or parts of his course of conduct, so as not to let him escape unfairly,[1] but he may be only punished for one offence. The illustration in the Code is the case of A. giving B. a beating with fifty blows

[1] This is directly provided in sec. 235 of the Criminal Procedure Code, but the section saves sec. 71 of the I. P. C. It is obviously one thing to *charge* a man with all that he has done so as to prevent an unjust escape (owing to some defect of proof as regards any part of the charge), and another thing to punish separately every act charged.

of a stick; each blow is a "voluntary causing of hurt" as well as an assault or use of criminal force; but A. would be punished not for fifty separate offences, but for the combined one.[1] And so a number of lies in one deposition of a witness, would form one offence of "giving false evidence;" but the same lie repeated in different depositions would be separately punishable. So a person charged with rioting in an unlawful assembly, and causing (or being responsible for) hurt in the course of it, might be convicted of both offences, but would be only given one punishment. And so when a person is convicted of house-breaking and also of theft in a house (in the same transaction), he would only get one punishment.

It is necessary to observe that this applies only when, as a matter of fact, we are dealing with what is *essentially one* transaction, like a whole beating made up of separate blows. It would not apply, *e.g.* to a robber out on a raid, who in one night should enter and rob several different houses. A practical instance is when a timber thief enters a defined State forest, and cuts down fifty trees: here it could not, under all circumstances, be said that the whole cutting was *in its nature one* transaction: probably owing to inconvenience, the prosecution would be content to make a single charge and merely appeal to the large amount of mischief done, as a reason for a heavier punishment, compensation, &c.; but theoretically (unless there were some special considerations in the case) the acts of mischief, theft, &c., would be as separate as the entering and robbing six houses in succession.

An analogous case (also in sec. 71) is the case where the same act has different aspects, according to each of which it might fall within different definitions of legal offence in the Code, or in different Acts of the Legislature;[2] also where several acts, each of which separately is an offence, are combined, and *so combined* constitute a new or different offence. Here also only one offence is punishable.

[1] But if while beating B., A. also attacked and beat X. who came to B.'s protection, here the beating of X. would be no part of the transaction with B., and A. would be liable to separate punishment for the offence against X.

[2] For example, where tampering with a valuable legal document might conceivably fall under the definition of "mischief," and also of "forgery" or "fabricating evidence." Again, an act might be defined as an offence both under the Code and also under the Forest Act.

Lastly, under this head, sec. 72 contains the useful provision that where a person has committed an act which is one or other of several offences, but it is doubtful which; he is to be punished for the act which has the lowest punishment provided. We shall find in the Procedure law also, provisions which prevent the escape of prisoners who have been convicted of an offence, and on revision or appeal, it appears that technically, the act comes under a different heading: the finding will be corrected, and the sentence, if need be, will be adjusted accordingly; but the guilty person will not escape on the mere technicality. An example of this case of doubt may be taken from Dr. Whitley Stokes. A. is charged with—

(1) assaulting Z (a woman);
(2) with assaulting her, intending to wound;
(3) with assault, intending to rape her.

It is clear that he committed the assault, but not clear whether he intended to wound or to rape; he is still liable, but only for simple assault. So in a case of "false evidence." A. makes two statements, which being directly contradictory, one of them *must* be false, but it is not known which; he can be convicted. Once more; it is clear that either A. or B. murdered Z., and that one committed the act and the other aided and abetted, but it is not certain which person did which act: here, as the abettor of a murder is liable to the same punishment as a murderer, both A. and B. are liable to the same.

It may sometimes happen that a person intending to do one thing, actually does another which he did not intend. Such cases are met by sec. 39. It is provided that a person must be held to have caused an actual effect "voluntarily," when he *either* causes it by the means whereby he intended to cause it, or by means which, at the time of employing them, he knew, or had reason to believe, were likely to cause it. Thus A., intending only to facilitate a robbery, deliberately sets fire to an inhabited house in the midst of a city. The result is that an inhabitant is burnt to death. A. is liable for the death, even though he did not intend it, and is perhaps sorry for it: for he must have known that it was likely to result from the means he employed to carry out his actual intention.[1] [After disposing

[1] Dr. W. Stokes remarks that the incendiary would be guilty of culpable homicide, but not actual "murder," unless he knew death to be the most probable result of his act.

of these general definitions and explanations, the Code at once inserts Chapter III. on Punishments, but this I propose to leave for the present.]

*General Exceptions (excusing acts which might otherwise be offences).*

We have next to discuss a very important subject which the Code deals with in Chapter IV., namely, the cases when acts which might in themselves be offences, are not so dealt with in law, by reason of the existence of certain circumstances which alter their legal character. It is to be understood (see sec. 6 of the Code[1]) that every definition of an offence and every penal provision in the Code is to be taken subject to the "General Exceptions" in Chapter IV.

No act is an offence when a person is bound in law to do it. A police officer seizing and confining A., who is guilty of murder, is under no liability for an offence of assault or wrongful confinement: and the same immunity extends to persons acting in good faith, but under a mistake of fact (not of law); as where a person bound to apprehend A., and, in good faith—with due care and caution—believing Z. to be A., apprehends Z.[2] No forest officer doing an act which the Forest law requires him to do, would be liable to prosecution for doing it, providing he acted in good faith.

Every judge and magistrate is protected in all acts of a *judicial nature*, if acting in exercise of a power, which he (in good faith) believes himself to possess. Similarly, acts done in pursuance of warrants or orders of a court of justice, so long as the order, &c., is in force, are protected, notwithstanding that the Court had not authority to issue such judgment, order, or warrant. Similarly, nothing is an offence which a person does when he is justified by law in doing it, or which he in good faith, but under a mistake of fact, believes himself justified in doing (*e.g.* arresting a person who appears to have committed

[1] And the section ought to have been placed at the beginning of Chapter IV.

[2] Observe the rule that mistake of fact excuses, and mistake of law does not. It sometimes happens that very hard cases arise under a mistaken belief as to legal duty, *e.g.*, see the case of the sentinel firing on a man in the belief that he was authorized and bound to do so—given in Markby (p. 136). The conviction would follow; but in such cases the prerogative of mercy would probably be exercised.

a murder—an act which in itself *any* person is legally justified in doing: but it might turn out that the person arrested had committed no murder, but had acted rightly in self-defence).

An act done by accident or misfortune, is never an offence—

(a) in the absence of all criminal intention or knowledge;

(b) if done in course of doing a lawful act—

(c) in a lawful manner, by lawful means, and with proper care and caution (sec. 80).

PERSONAL SECRETARIAT LIBRARY.

In our earlier analysis of an "act" (p. 23) we made mention of some principles which we now find enacted in the Penal Code (secs. 82—86). Young children (as explained at pp. 24, 32), idiots, lunatics, imbeciles, monomaniacs, and intoxicated persons (when the intoxication is produced without their knowledge and against their will) are not responsible. This rests on the theory that the subject of a criminal action must not only be capable of willing, but must know what he is doing and be capable of judging of the natural or probable consequences of his act. With regard to sec. 86, which deals with the case where the intoxication is voluntary, Dr. Whitley Stokes observes that this section is properly a matter of evidence; and is a 'rider' to sec. 85. The *voluntarily* intoxicated person is held responsible for his act; and if the act is one that requires a particular intent or knowledge, he is held, in law, to have had the same intention as he would have had if not (voluntarily) intoxicated.[1] The Code does not mention an exception for deaf-mutes.

There is also a series of cases which are naturally connected together, and so I place them. I refer to acts (*a*) which, though harmful, are done to *prevent* other *greater harm* to person or property; (*b*) acts done by *consent;* and (*c*) acts done for *benefit* of a person, with, (and in emergencies even without) his consent.

Acts done to prevent other harm (*a*), must be done without any criminal intention, and in good faith *for the purpose* of preventing other harm to person or property: and it is a question of fact whether the harm to be prevented or avoided was of such

[1] There are certain limitations to this rule; and some difficulties may arise which I do not go into, but merely refer to Anglo-Ind. Codes, Vol. I., p. 13. If a drunken man attempted to pass a false coin, being too drunk to examine or see that it was false, I have no doubt that he would be allowed to plead it.

a nature, and the danger so imminent, as to justify the act (sec. 81). The illustration in the Code is clear; and under this head comes also the justification for blowing up certain premises to stop a conflagration.

As to acts done with *consent* (*b*), I will only indicate, with reference to secs. 87-92, the general idea of these provisions; it is, that no act that is not intended to cause death or grievous hurt, "ought to be an offence by reason of any harm it may cause to a person of ripe age, who, undeceived, has given a free intelligent consent to suffer the harm or to take the risk of the harm." Thus in a fencing-match, where due precautions are taken, and there is no foul play, no offence is committed if harm is done, as each party has expressly or impliedly consented to take the risk. Observe that here an age of over eighteen years (whatever the actual general law on the subject of minority) is deemed sufficient to ensure capacity to consent. Observe also that consent in these cases will not excuse acts intended, or known to be likely, to cause death or serious hurt; and we shall presently note that it will not excuse an act which is declared to be an offence *of itself*. Hence the expressed or implied consent of the parties to a *duel*, would not excuse either of them if he caused death, or wounds which amounted to grievous hurt.[1] *This* head, it will also be observed, relates to acts done with consent, without respect to any intent to *benefit* the consenting party (*e.g.* to save his life in danger).

(*c*) There are many cases, chiefly connected with surgical operations, in which a person is likely to die, or to suffer seriously, unless some operation or other "harm" is done him, and yet there may be risk in doing the necessary act. Here of course, if possible, *consent* is a condition. It would be a case of "grievous hurt" to draw out a man's tooth against his will; but it is none for a dentist to do it with consent. An act not *intended* to cause death,—even though there is risk of causing death,—may be justified when undertaken *for the benefit* of a person who consents. If however the person is incapable of consent (by reason of infancy,[2] lunacy, &c.) the guardians' consent is

[1] A duel involves the intention to cause death. An express provision in a later section, would allow the consent not to excuse, but so far to mitigate, the offence, that the crime of killing would not be *murder*, but only *culpable homicide*.

[2] Here infancy (sec. 89) only extends to 12 years of age.

sufficient: but the grounds of such consent are prudently restricted. The consent cannot be given to intentionally causing (or attempting to cause) death; nor can it be given to an act (*e.g.* an operation) likely to cause death or grievous hurt, unless it is for the express purpose of preventing death or grievous hurt, or curing a grievous disease or infirmity.

A common instance is where a person is in imminent danger, and the death or great injury to the person can only be prevented by undertaking a risky operation. The person *may* die under it, but still it is the only chance of saving him.

But none of these rules depending *on consent* (secs. 87, 88, 89) apply when the harmful act done is an offence *independently* of the harm caused or likely to be caused. The case of a duel has already been instanced; and under the latter section may be instanced the causing of miscarriage, which (except only for the purpose of saving the life of the woman) is an offence in itself—independently of any harm it may cause; here consent of the woman or a guardian will not justify it (sec. 91) in any other case but that of necessity for saving the life of the woman.

A still further case arises where *consent* cannot, under the circumstances, be signified; or no guardian exists who can give consent in time: here the excusable act (as before) must not amount to intentional causing or attempting to cause, death, or even causing hurt of any kind, except in order *to prevent death or grievous hurt* or *grievous disease.* An instance is the case of a man thrown from a horse and becoming insensible: a surgeon near, sees that trepanning will be the only chance: consent is impossible: the surgeon acts in good faith, not intending to cause death, or even hurt, except such as is necessary to save the patient's life: he accordingly trepans the man, who dies under the operation: the surgeon has committed no offence. So in the case of firing at a tiger which has seized a man. It is the only chance, though there is a great risk of the ball hitting the man. If it does so, the person firing the gun (acting of course in good faith for the sufferer's benefit) is not guilty of an offence.

An act under "duress" (as it is called) is excused, if it is compelled by threats which *reasonably* cause apprehension of instant death: provided that the person did not voluntarily put

himself into the situation in which he became subject to the duress (sec. 94). There are some further explanations as to this on which I do not enter. But observe that "duress" which might affect acts in civil law, is not sufficient; nothing short of the fear of instant death will excuse a criminal act.

In connection with this exception, must be noticed the case of a man doing some harm to others, to prevent injury to himself. May a man, for example, steal food to prevent himself from dying of hunger? It is held in such a case that a legal offence is committed, though a magistrate might mitigate his sentence according to the circumstances.

Under this head also would come cases where acts are committed of necessity; as where cattle are driven into a forest (where it would be trespass to go), in order to seek shelter from a sudden storm, or where persons overtaken at night in a forest, cut wood and make a fire to save themselves from suffering by cold or to scare away wild beasts. A technical offence is committed; but in such a case, a prosecution would not be instituted; if it were, and this defence appeared true, a merely nominal sentence would be awarded.

Section 95 should be noted.[1] The object is to take out of the category of criminal offences, those petty and trifling acts which, though strictly within a definition of crime or offence, are only productive of "harm so slight that no person of ordinary sense and temper would complain of such harm."

In a case reported in Ind. Law Rep. V. Bombay (Criminal Cases), p. 35, a person had been convicted of stealing from a bit of forest land (it happened to be a private forest, but that does not affect the point) a few pods of some tree, worth 3 *pie:* the conviction was quashed under this section. It would be otherwise, if the act was really a part of an act of graver character, *e.g.*, a thief may have got access to a lot of property and yet had time only to appropriate a very small quantity. I recollect a case, where a notorious burglar had broken into premises hoping to find a rich booty, but only succeeded in carrying off a bit of old iron almost worthless; he was rightly given

[1] I have occasionally heard of forest cases which should, in view of this section, have never been prosecuted. It is very desirable to avoid making forest conservancy more obnoxious to the ignorant peasantry than in the nature of things it must be; and a wise discretion should be exercised in filing a criminal complaint of a forest offence if it is really insignificant, or a warning would suffice. Stripping off leaves from a tree is a forest offence, because such an act may cause the death of, or serious injury to, the tree; but obviously it would be unreasonable to punish a man for picking off a single leaf; yet as the plural includes the singular, such a prosecution would be possible except for this section 95.

a heavy sentence; but then the entry or housebreaking was an offence independently of the value of property taken.

Another important exception is when the act which would otherwise be an offence is done by a person in *defence* of:—

| | |
|---|---|
| (*a*) His own *body*<br>(*b*) The body of another | Against any "offence" affecting the human body ("offence" under the I. P. Code—see sec. 40). |
| (*c*) His own<br>(*d*) Another person's | *property* (of any kind) — Against acts (or attempts) of:—<br>a. Theft.<br>b. Robbery.<br>c. Mischief.<br>d. Criminal trespass.[1] |

It is immaterial (sec. 98) whether the act which gives rise to the right, is committed by a person who by reason of youth, or unsoundness of mind, or intoxication, would not be guilty of an offence.[2]

But the right of private- or self-defence only exists subject to the provisions of secs. 99—106, which should be read.

Briefly, the sections are concerned—

(A) With the circumstances under which the right arises or does not arise; and

(B) With the extent of harm which may be caused in defence; first, in the case of attacks on the body, and then in the case of those on property.

(*Ad* A) There is no defence against an act by a *public servant* done under colour of his office, or done under direction of a public servant (even though not strictly justified), unless the act reasonably causes apprehension of death or grievous hurt.[3]

[1] Observe it must be a *criminal* trespass under the I. P. C., *i.e.*, not an ordinary civil trespass or a trespass under the Forest law.

[2] This is obviously just; for though the person doing the act will be excused, the person defending himself would be just as much affected by the act whether legally an offence or not.

[3] A public servant, in doing an official act, making an arrest, &c., never need use such violence as to give a reasonable fear of death or grievous hurt to the person if he did, the latter would be justified in defending himself against the unjustifiable violence. A public servant making an arrest may indeed use force if he is resisted, but the force is only such as is justifiable under section 46 of the Criminal Procedure Code, and would only extend to causing death in one particular case.

The person defending himself is not deprived of his rights, unless he knows, or has reason to believe, that the person acting against him *is* a public servant, or that the person acting under directions, *is* so acting, or the person states that he is so acting, and shows his warrant, if he has one, on demand to see it.

The right *never* arises when there is time to have recourse to the protection of the public authorities.

(*Ad* B) It *never* extends to causing more harm than it is necessary to inflict for the purpose of defence. But it extends (*if necessary*) to causing death or any other harm, to the aggressor, if the act (against which the defence is made) consists of—

(1) Assault causing reasonable apprehension that death, or grievous hurt, will ensue.

(2) Assault with intention of rape, or gratifying unnatural lust.

(3) An assault with intention of kidnapping, or abducting, or wrongfully confining the person, under circumstances which reasonably cause apprehension that it will be impossible to have recourse to the public authorities for release.

If the offence be not of these kinds, then the defence must not extend to killing, but only to causing harm other than death: (subject to what has already been stated, that the harm is never to be greater than is necessary).

Sec. 102 tells us when the right of defence arises or begins, and how long it lasts.

The Code then goes on to similar conditions regulating the defence of *property*. Briefly put, the defence can only extend to causing death, when the attack on property is of a grave kind, *e.g.*, robbery, housebreaking by night, mischief by fire in a building, &c, and against theft, mischief and house-trespass, if these lesser forms of offence are committed under such circumstances as to give rise to the reasonable apprehension that death or grievous hurt will result if the right of defence is not exercised. Only harm short of death, may be caused in lesser cases (subject to the general provision already noted).

Sec. 105 is intended to tell us (in the case of defence of property) when the right of defence begins or arises, *i.e.*, with

the apprehension; and how long it lasts (as sec. 102 did in case of defence of the body).

This brings to a close the general or introductory portion of the law relating to offences. We have next to consider:—

(1) The classification and character of offences in the General law, *i.e.*, the Penal Code.

(2) The question of participation: *i.e.*, where more persons than one are concerned in some way—more or less—in the commission of an offence.

(3) With "attempt"—*i.e.*, where the offence is begun but not carried out.

(4) And lastly, the subject of "legal punishment" in general; and some supplementary incidental matters connected with prosecution and punishment.

## LECTURE VIII.

### THE CLASSIFICATION AND DESCRIPTION OF OFFENCES.

THE offences contemplated by the Ind. Penal Code are those of a general character, affecting the every-day life of the nation, the safety of the Government, of the public, and also the body and property of the individual. Some matters connected with the currency, with trade and industry, are also regarded as sufficiently general to find a place. But otherwise, all cases of offences and prohibitions which are constituted and declared by law in connection with particular branches of public administration, or in special occupations only, are left to "special" laws. As already stated, the result of this division will often be that an act may constitute an offence both against the General law and the Special law: and thus it is a matter for consideration under which to take action. Either can be selected, but of course not both; for a man cannot be made to suffer twice for one offence (p. 98).

I shall offer only a bare enumeration of the classes of offences under the Code; adding a remark here and there—for which I am often indebted to the admirable introduction prefixed by Dr. Whitley Stokes to his edition of the Ind. Penal Code.

For a full study of Criminal Law, much more detailed comment would be needed. For example, the whole question of murder, and of homicide which though criminal may not amount to murder, is a somewhat difficult one; but in view of our object, it will be almost wholly passed over; and so with many other offences.

### I. Offences against the State, Public Justice, &c.

The first class is that which includes all offences against the Crown, the State, and the Community at large. It will be sufficient to indicate—

(Chap. VI.). Against the State, *e.g.*, waging or abetting the

waging of war against the Queen, or a friendly Asiatic State; collecting arms; concealing a design to wage war, &c., &c.

An offence against the State not mentioned in the Code, is that of *revealing official secrets and information.* These offences are now punishable by a special Act, XV. of 1889.

Offences against the Army and Navy are in Chap. VII. Here the offences are mostly of abetting; but these abetments are held to be on a special footing, because the offender is a civilian not subject to the Military Law, while the soldiers, &c., abetted, are subject to it. Under this Chapter come all offences of abetting mutiny, seducing soldiers and sailors from their duty, abetting desertion, and harbouring deserters; wearing the uniform of a soldier, &c.

The offences next dealt with are (Chap. VIII.) those against the public peace and tranquillity. They are mostly connected with what are called "unlawful assemblies," *i.e.*, an assembly of *five or more* persons having the *common object* of—

(1) Overawing by criminal force (or show of such force) the Government (of India or of a Province), or a public servant in lawful exercise of his power as such public servant.
(2) Resisting the law or legal process.
(3) Committing mischief, criminal trespass or other offence. (Here "offence" means an offence under the Code, or under a special law, if punishable with six months' imprisonment.)
(4) By criminal force, or show of it, taking possession of property; depriving a person of a right of way, use of water, or other such right; or enforcing a real or supposed right.
(5) By force, or show of force, compelling a person to do what he is not legally bound to do, or to omit what he is entitled to do.

Any person who, being aware of the facts which render the assembly unlawful, joins it, or continues in it, is said to be a "member of an unlawful assembly." Whenever such an assembly *or any member of it* uses (any kind of) force or violence *in prosecution of the common object of the assembly,* there is said to be a "riot," and *every* member of the assembly is chargeable with "rioting." If the rioter is armed with deadly weapons, the punishment is more severe. There are various subsidiary provisions; such as those which protect a public servant engaged

in suppressing a riot; which punish acts tending to incite a riot; those which make land-holders—of the land where the assembly takes place—liable, &c., &c.

The same chapter prohibits "affray," which means (something less than a "riot," viz.) a disturbance caused by *two or more* persons *fighting* in a *public place* (secs. 159—160).

The next class of offences is that relating to the Public Service; and naturally is dealt with under two chapters, one relating to offences *by* public servants (or at any rate directly connected with their action as public servants, such as abuses of authority, and unlawful acts which touch the integrity and impartiality of a public servant): the other relating to offences *against* public servants, by way of resistance to their authority, obstruction of them in their duty, neglect to aid them in the proper way, and the like.

Chap. IX. (Offences by Public Servants) contains the following:—

(1) Bribery. (This will be spoken of in detail under the head of the Forest Service, and so is here only mentioned.) The person who *gives* or offers a bribe is guilty of *abetting* the taking.

(2) Private person taking gift, etc., as a reward for inducing a public servant, *by corrupt or illegal* means, to act or not to act, &c.

(3) The same; as a reward for using *personal influence* with a public servant. (This does not apply to an advocate who is paid to influence a Court by his eloquent address, nor a person paid to draft a skilful memorial calculated to effect its object: for *personal* influence is not here in question.)

(4) Public servant taking a gift from a person concerned, or likely to be concerned, in some official proceeding before himself (see illustrations to sec. 165).

(5) Public servant disobeying the law . . } with intent
(6) Public servant framing an incorrect document } to injure.

(7) Public servant unlawfully engaging in trade.[1] (Various degrees of servants are expressly prohibited by law from trading, *e.g.*, Forest Act, 1878, sec. 74; Police Officers under Act V. of 1861.)

(8) Public servant unlawfully bidding at an auction.

[1] Trade is "habitually buying and selling with a view to profit."

[The two remaining sections refer to *pretended* public servants, *i.e.*, to persons so acting as to make it appear that they are public servants.]

(9) Private person personating a public servant.

(10) Private person wearing badge, garb or token, in order to make it believed that he is a Public servant.

It will be observed that public servants committing a breach of trust, are liable under the section regarding ordinary breach of trust, only that sec. 409 provides a severer punishment. And in a case of "cheating," *e.g.*, pretending to have disbursed money for public service, and so getting a cheque passed in the public accounts, or producing false vouchers by "forgery;" the ordinary sections relating to these offences are considered sufficient.

The next series of offences (Chapter X.) has still to do with public servants, but consists of acts of *private persons, against their authority* :—

(1) Absconding to avoid service of summons, order, proclamation, etc.

(2) Preventing service of summons, order, proclamation, etc.

(3) Neglect to attend in obedience to summons, etc.

(4) Omission to produce a document when required.

(5) Omission to give information which he is legally bound to give (sec. 176).

(6) Giving false information (177).

(7) Refusing to take oath or affirmation.

(8) Refusing to answer.

(9) Refusing to sign a statement.

(10) Making a false statement on oath, etc.

(11) Giving false information, with intent to get a public servant to take action to the injury or annoyance of some one.

(12) Resisting the taking of property by lawful authority.

(13) Obstructing (official) sale of property.

(14) Illegal purchase at such sale.

(15) Obstructing public servant in exercise of his duty.

(16) Omission to help public servant when bound to give such help (sec. 187).

(17) Disobedience to order by public servant lawfully empowered to promulgate it[1] (sec. 188).

[1] The orders here contemplated are those which become necessary in particular places and at particular times, for the sake of preserving public tranquillity, health,

(18) Threat of injury to public servant.
(19) Threat to any person so as to deter him from applying to a public servant (sec. 190).

From this, the Code naturally passes to the important head of offences against Public Justice. Here again, there may be two classes of offenders: (I.) private persons may offend against the judge himself or the Court, or against the administration of justice; or they may resist the process of the law: (II.) the judge or other officer may himself act wrongfully.

(I.) The offences by *private* persons against *public justice* are—

(1) Giving false evidence.
(2) Fabricating false evidence. (One consists in making false *statements*, orally, the other in making written entries, or causing any *circumstance* to exist, so that it may appear in evidence and mislead), *e.g.*, putting jewels into A.'s box, so as to make it appear that A. had stolen them.[1]

In this case, the *nature of the result* is looked to; and falsehood tending to produce conviction *of a capital offence*, &c., is more seriously dealt with.

Then follows a series of sections, 196—229, which it would take too long to enumerate, and which are easily understood from reading them. They cover all offences connected with the issuing of false certificates and declarations;[2] causing the disappearance of evidence to conceal an offence; omission to give information regarding an offence *actually committed* (sec. 202 differs in this respect from sec. 176); destroying or secreting a document to prevent its production; false personation in a proceeding in Court; fraudulent removal of property

safety or convenience. They could not be provided by law directly, like those injunctions which are required at all times and in all places; hence the public authorities are empowered under the Criminal Procedure Code to issue orders for the occasion or special circumstances, and disobedience to these orders is made penal.

[1] Evidence consists (1) of what witnesses know and *state*, or what is recorded in books, papers, returns, &c., or (2) of *facts* which lead to inferences. Hence the offences relate to "false statements" (oral and written), and to "false facts" —if I may use the expression—as explained by the illustration in the text.

[2] Suitors in Court are often required by law to "verify" their plaints, pleadings, &c., by attaching to the petition a signed form declaring that what is set forth is true to the best of the petitioner's knowledge and belief; such declarations, if knowingly and intentionally false, are punishable under this Chapter.

to prevent seizure; fraudulent claims, &c.; instituting false criminal proceedings with intent to injure (sec. 211); harbouring offenders; taking gift to screen offender, &c.

(II.) *Public servants* may also themselves commit offences against justice; such are, framing incorrect record, or disobeying the law, with intent to save a person from punishment or property from seizure; corruptly making an illegal judicial order; illegal commitment for trial; illegal confinement; intentional omission to apprehend (and this becomes a still graver offence if the person to be apprehended is already under sentence); negligently suffering escape of a prisoner.

Lastly, come sections dealing with resistance to lawful arrest, escape and rescue; unlawful return from transportation; breach of condition of remission of punishment; insult to a public servant in a judicial proceeding; personating a juror or assessor.

Another class of offences against the public, relates to *coin and Government stamps* (Chap. XII.) and to *weights and measures* (Chap. XIII.). These we may pass by. So, too, we will only mention without any remark, the class (Chap. XIV.) which defines offences affecting *public health* (nuisances;[1] adulteration of food, spreading infection, disobeying quarantine, &c.); *public safety* (rash driving or navigation, showing false lights or buoys, overloading vessels, obstructing public ways, negligence with poison, fire and explosives, machinery, insecure buildings, animals, &c.); *public morals* (obscene books or songs, lottery offices, &c.).[2]

The last class (Chap. XV.) of public offences includes those *relating to religion* (injuring or defiling places of worship, &c.; disturbing religious assemblies; insult to religious feelings).

## II. Offences against the Human Body.

The Code then proceeds to the Offences affecting the Human Body (Chap. XVI.).

(A) Affecting life, *i.e.*, murder and culpable homicide.

[1] No length of time can justify a nuisance. These matters may be also the subject of a civil suit as well as of criminal prosecution.

[2] Public gambling is prohibited in a Special law. There are no sections about cruelty to animals in Chap. XIV.; the subject was ultimately provided for by a Special law, Act XI. of 1890.

As offences of this class do not come within the scope of a Forest Officer's duty, it will be sufficient briefly to indicate the main idea of the law. Homicide, or causing death, in itself, may be culpable or not culpable. Cases which come under the latter description are only dealt with in the Chapter on general exceptions. Homicide may be purely accidental or by misfortune, there being no evil intention and no want of proper care or caution. It may be caused by a child or a lunatic, &c., who is incapable of committing a legal offence. It may also be justifiable, as where a sentence of death has been passed by a judge acting in his office, and the executioner, under a proper warrant, carries out the sentence; or it may be caused, in good faith, in the endeavour to act for the benefit of the person killed (p. 102); or in the exercise of the right of self-defence (p. 105).

Again, death may be caused (sec. 304A) by negligence (*i.e.* by a rash or negligent act), and so may be a crime, but not on the graver footing of "culpable homicide" as defined by the Code.

Homicide is legally "culpable" when the act causing death is done—

(1) With the *intention* of causing death.
(2) With the *intention* of causing such bodily injury as is likely to cause death.
(3) With the *knowledge* that such act *is likely* to cause death.

And under the I. P. Code, culpable homicide *becomes murder, if* the following intention or knowledge exists (this being something additional to, or more extensive than, that previously stated):—

(1) The intention of causing death.
(2) The intention of causing such injury as the *offender knows* to be likely to cause the death of the person injured.
(3) The like intention to injure when the injury *is* (in itself) *sufficient*, in the ordinary course of nature, to cause death.
(4) By an act known to be so imminently dangerous that it will in all probability cause death (or injury likely to result in death), *and* there is *no excuse* (a question of fact) for incurring the risk.[1]

[1] The Code is open to the objection that the four cases where homicide becomes

But *also*, to make culpable homicide murder, it is necessary that there should be an *absence* of certain special or exceptional conditions. Thus—

(1) It is not murder if the offender is deprived of self-control by *grave and sudden provocation* (not being voluntarily sought, nor caused by something done in obedience to the law or in the lawful exercise of power by a public servant, nor by anything done in the exercise of a right of self-defence).

(2) If the death was caused in self-defence, and yet the act of defence exceeded the legal limits of the right—there being no premeditation nor intention to do more harm than necessary.[1]

(3) If done by a public servant (or a person aiding a public servant), acting for the advancement of public justice, although the limits of the law are exceeded; provided the act is believed in good faith to be lawful and necessary, and there is no ill will towards the person whose death is caused.

(4) If done without premeditation *in a sudden fight in the heat of passion* on a sudden quarrel, no undue advantage being taken, and no action in a cruel and unusual manner.

(5) When the person whose death is caused being over eighteen years of age, suffers death, or takes the risk of death, with his own consent. (So that under the Code, a duel agreed upon between adults, might give rise to culpable homicide, not to murder, as it would be in English law.)

In judging, therefore, in any particular case, whether it comes under the head of *murder* or not, attention has to be paid *both* to the nature of the intention or knowledge (sec. 300 as distinguished from 299), *and* to the absence of one or other of the five exceptions.

Murder is punishable with death (or transportation for life). Culpable homicide is only punishable with transportation for life, or imprisonment for ten years and fine, in the worst cases, and imprisonment in the less serious (see sec. 304). So that

*murder*, are in practice, difficult to distinguish from the three cases where homicide is culpable, but not murder. See the whole matter clearly explained in Anglo-Ind. Codes, Vol. I., p. 39 ff.

[1] People obliged to defend themselves will, it is hoped, keep themselves cool or under due self-command; but still it is so natural that the legal limits should be (unintentionally) exceeded in the hurry and excitement of the moment, that an excessive act, resulting in death, though necessarily criminal, should not be regarded as a positive "murder."

every degree of criminality or of excuse can be allowed for, in estimating the culpability of the homicide with reference to its punishment.

I may pass over the several modified or special cases of murder, etc., in the Code, only noting that sec. 309 punishes an attempt to commit suicide.

(B) The next class, which consists of offences connected with *birth*, *i.e.*, causing miscarriage, injury to unborn children, exposure of infants, concealment of birth, &c., does not call for our attention.

(C) A large class of offences comes under the category of "hurt."

Hurt is either "simple" or "grievous." It is the latter only when one or other of eight specified kinds (sec. 320): these include any hurt which endangers life, or causes the sufferer to be, during twenty days, in severe bodily pain, or unable to follow his ordinary pursuits.

There are also special forms of these offences, or circumstances under which causing hurt or grievous hurt constitutes a new offence :—

(1) The law takes into consideration whether hurt is caused by dangerous weapons or means, or by noxious drugs.[1]

(2) Or done with intent to extort property or compel to an illegal act, or extort a confession.

(3) Or done to a public servant to deter him from his duty.

A distinction is also drawn (in mitigation of the offence) where there is grave and sudden provocation (secs. 334, 335). Three sections are also added, which deal with hurt caused involuntarily and yet culpably—that is, there is a want of due care not to cause hurt.

(D) Next come sections on *wrongful restraint* and *wrongful confinement*, which I need not remark on; and then follows the subject—

(E) Of "*criminal force*" and "*assault*."

[1] It is true that as great and lasting an injury may be done with a blow of the fist as with a knife or a hot iron; but, remarks Dr. W. Stokes, "in the vast majority of cases, the offender who has used a knife or a hot iron for the purpose of wreaking his hatred, is a far worse and more dangerous member of society than he who has only used his fist."

I shall only explain that "assault" is committed where there is only the gesture or preparation causing apprehension of force; but *mere* words (however abusive) do not amount to an assault. The "assault" passes into "use of force" when some *act* is done on the body, or something put in motion (as defined in sec. 349). And the "force" is "criminal force" (sec. 350) when it is used without consent, with intent to commit any offence, or cause injury, fear, or annoyance to the person.

There are specially grave kinds of assault, when directed to outrage a woman's modesty, to dishonour a person (sec. 355), in attempting theft, wrongful confinement, &c.

(F) The offences of kidnapping, abduction, slavery, and forced labour, are naturally connected with (D) and (E), but do not call for our special notice.

(G) The last class of offences in this part of the Code are rape and unnatural offences. They are offences against the body, and so necessarily find a place in the criminal law regarding the human body. They often give rise to difficult questions of evidence; but it will not be necessary to deal with the subject.

We may pass on, in the next Lecture, to consider a group of offences *against Property*, with which Forest Officers may have a great deal to do in the course of their work.

It will be noticed that offences against property, are in two divisions: in one, an owner is *deprived* of property; in the other property is *injured* (by some form of mischief) without any (necessary) direct deprivation of the object.

Criminal trespass may be connected with some attack on either person or property, and so naturally follows.

## LECTURE IX.

### THE CLASSIFICATION AND DESCRIPTION OF OFFENCES (*continued*).

### III. Offences against Property.

THE large class of offences against property, is dealt with in Chapter XVII. of the Code.

Theft, which is the first, is always of *moveable* property (p. 37); and as the thing must be moved in order to commit a theft, immoveable property cannot be the subject of theft. But an immoveable object may be severed from the ground with a view to taking it away; and it may be (Exp. 2 to sec. 378) that a moving which effects the severance, is also a moving which completes the theft.

"Theft" is only chargeable when the property is in the "possession" of the owner (p. 58). If not, the offence is "criminal misappropriation." It seems a pity that the distinction is made, because of the difficulty connected with the legal idea of "possession." The subject is however cleared up to some extent, by the numerous "illustrations" to sec. 378, which the student should read.

Theft need not cause wrongful gain to the thief, it is sufficient if it causes that *or* wrongful loss to the other party. This follows from the words: "A person intending to take *dishonestly* any moveable property out of the possession of any person, &c.;" "dishonestly" implies causing "wrongful gain" or "wrongful loss" (see definition in Chapter II.).

An aggravated form of theft (sec. 380) is when it is from a building, tent, or vessel, used as a human dwelling or as a receptacle for property. Another is when the thief is a clerk or servant of the owner (sec. 381). Another is where the theft is committed, the thief having made preparation to cause death, hurt or restraint (sec. 382).

"Extortion" is distinguishable from theft, by the circumstance that the person *consents* to give up the property, only

that the consent is not voluntary, being enforced by fear of injury to himself or some other person. The offender thus dishonestly induces him to deliver property or a valuable security, &c. If the injury threatened in the act of extortion. is death or grievous hurt, the penalty is much heavier (sec. 386). So if the threat is to make an accusation against the person of a capital or other grievous offence.

Either theft or extortion, *when committed under certain circumstances*, becomes "robbery." Theft becomes robbery when, in committing the theft, or in carrying away the spoil, the thief causes or attempts to cause (for the purpose of theft or carrying away the spoil) death, hurt, or wrongful restraint, or fear of instant death, hurt, or wrongful restraint. Extortion also becomes "robbery," if the offender is in presence[1] of the person put in fear, and puts him in fear of instant death, instant hurt, or instant wrongful restraint to himself or some other person (*e.g.*, the sufferer's child), and by so putting him in fear, induces the sufferer to deliver up the thing extorted.

In practice it will be found that most robberies are partly theft and partly extortion. Robbers commonly both threaten and actually seize what they find.

If five or more persons conjointly commit or attempt to commit a robbery, every one of them concerned is said to commit "dacoity."

There are subsidiary provisions concerning this offence:—

(1) Where the dacoity or robbery is accompanied by murder, *every one in the gang* is made liable to heavier punishment though not personally chargeable with the murder.

(2) So if grievous hurt is caused, and the offender is armed with deadly weapons.

(3) The fact that a person habitually belongs to a gang of dacoits, or of wandering thieves, &c., is made punishable as an offence of itself.

Criminal misappropriation (sec. 403) is dishonest conversion or misappropriation of any moveable property (not in possession of any one), and it may be for a time only. Dishonest intention is inferred from the circumstances of the case.[2]

[1] For in some cases, extortion is practised by threatening letter, message, &c.

[2] For example, A. takes a watch from B.'s table drawer, honestly believing

Explanation 2 to this section should be referred to as dealing with the case of a person who *finds* property and retains it, taking no steps to discover the owner. He will not commit an offence, where the property is such that it is impossible to find an owner (*e.g.*, where a person picks up a shilling lying on the roadside).

*Criminal breach of trust* (sec. 405) is something beyond theft, for here, though the property is not in immediate possession of the owner, it has been entrusted to the keeping of the person who misappropriated it. The offence is committed when the person entrusted—

(1) dishonestly misappropriates or converts to his own use;

(2) dishonestly uses or disposes of the property { in violation of a direction of law; in violation of a legal contract (expressed or implied) as to how his trust is to be discharged;

(3) wilfully suffers any other person to do so.

There are special sections for the graver offences of this class, where the trustee is a carrier, warehouse-keeper, or a clerk, or servant, or is a public servant, or a banker, broker, agent, or attorney.

Observe here the general distinction. In *theft*, the owner is in "possession:" in *criminal misappropriation* he is not: in *breach of trust* the owner is not in possession because he has actually left the thief in trust with the property.

And to complete the subject, add: if theft is accompanied by violence, it is "robbery." If the offender does not himself take the property (perhaps does not know where to find it), but induces the owner to deliver it, under fear, &c., he commits extortion; and extortion may become "robbery," if the extorter is present and threatens death, &c. "Robbery" by a gang of five or more, is "dacoity."

The next offence to be noticed—that of "receiving stolen property," is an offence naturally connected with the foregoing series. If there were no "receivers," doubtless the number of thefts and robberies would be much reduced.

that it is his own watch. This is not theft; but if A., on discovering his mistake, dishonestly keeps the watch, he will be guilty under sect. 403.

I will only notice that very often a person is found in recent[1] possession of property which is shown to have been stolen from another; he cannot explain how he got it, or gives a false account; when such possession (under the circumstances) gives rise to a presumption of guilt against the person in unexplained possession, the presumption is that he is the thief or the misappropriator, and not (as is commonly charged) that he is a "receiver." The exact inference to be drawn must, however, depend on the circumstances and natural probabilities of the case.

"Cheating" (sec. 145) is a fraud which has many forms; it causes the loss of property by consent, but in a different way from extortion, because the owner here gives up the property, not by reason of *fear* (as in extortion), but by reason of *deception*. His consent is one which he could not have given if he were not misled. Cheating is sometimes carried out by the offender "personating" some one, and thus deceiving (sec. 419).

From "cheating," the Code passes to fraudulent deeds and disposition of property, about which I need say nothing; after which it deals with a considerable series of offences, all coming under the head of *Mischief* (see p. 117).

In all *mischief*, there must be an intent (or a knowledge of likelihood) to cause wrongful loss or some damage to the public or to any person, or some change in property which affects it injuriously. The *illustrations* to sec. 425 will make the matter clear.

The Code distinguishes :—

(1) Simple mischief (sec. 426).

(2) Mischief more serious, as causing loss, &c., to 50 Rs. value and over (sec. 427).

(3) Mischief by killing, poisoning, or maiming valuable animals, &c. (sec. 428).
Ditto of special value (sec. 429).

(4) Affecting public water supply.
Affecting any bridge or Public work.
Affecting public drainage, or causing inundation.
} secs. 430–432.

(5) Affecting lights and land marks (secs. 433–434).

[1] If the possession is of some duration, the inference might not arise; in the nature of things it might be more probable that the goods had passed through several hands.

(6) { By fire or explosive (sec. 435).
Ditto in aggravated forms (sec. 436 438) (*i.e.*, to house or place of worship, or a ship).

(7) Special forms of mischief, as running a vessel aground, &c. (sec. 439).

(8) Mischief aggravated by being committed after preparation to cause death, or hurt, &c. (sec. 440).

"*Criminal Trespass*," as I shall elsewhere have to notice, does not include any mere infringement of right like civil trespass, nor even such a trespass as would be punishable with fine under Forest law if committed in a forest or plantation. There must be—

(*a*) an entry on property in the possession of another;

(*b*) an intent { to commit an *offence* (*i.e.*, by definition), one under the I. P. Code or a more serious one under a special or local law, *i.e.*, punishable with six months' imprisonment.
to intimidate, to insult, to annoy } any person in possession.

(*c*) if the original entry was innocent, the offence may be committed by *unlawfully remaining* with the above intent.

Should the Criminal Trespass be in a building, tent, or vessel, used as a human dwelling, or place for keeping property, or as a place of worship, it becomes "house trespass."

House trespass again may be committed in forms of increasing criminality:—

(*a*) It is "lurking house trespass" (sec. 443) when the offender has taken precautions to conceal his entry from a person who has the right to exclude or to eject him. And lurking house trespass may be aggravated by being committed "at night," *i.e.*, after sunset and before sunrise.

(*b*) Lurking house trespass becomes "housebreaking" if the concealed entry is effected in one of the ways described in sec. 445; all of these imply wrong doing or evil intent; such as breaking a lock, making a hole, entering by a passage not intended for human ingress, or by scaling, climbing, &c., entering forcibly, &c.

Housebreaking may be aggravated by being committed "at night."

A whole series of sections then separately declare the punishment for the different offences, fixing the punishment higher according to the increasing degree of heinousness, *e.g.*, house trespass (sec. 448–453), lurking house trespass or housebreaking (sec. 453–459).

Either of these forms of trespass may be not only of a higher or lower degree of criminality in itself, but may further differ according to the purpose of the trespass or its attendant circumstances; such as, intent to commit certain classes of offence; with preparation for causing death or hurt, &c. If grievous hurt is caused, or the attempt to cause death or grievous hurt is made, during a lurking house trespass, or housebreaking, the offender is liable to transportation for life. And (by sec. 460) when the offences are committed by night and any one person concerned in them, causes or attempts to cause death or hurt, the whole of the persons concerned in the house trespass, are liable to transportation for life.

### IV. Offences relating to Documents, &c.

Passing from direct attacks on property, the Code (Chap. XVIII.) proceeds to the wide series of offences which affect property, not by directly depriving an owner of it (theft, &c.), nor directly destroying or reducing its value (mischief), but by tampering with and forging *documents* which are securities by which property is held or which are necessary for trade and commerce. Offences regarding trade and property marks are also included in this category, as tending to injure trade and to defraud purchasers. The main groups of sections refer:—

(1) to making false documents and forgery; enumerating various degrees of offence, the punishment of which is made greater according to the nature of the intent with which the forgery is committed, and the character of the document forged or falsified.

(2) Offences relating to Trade and Property marks.

I do not think it necessary to offer any remarks on the subject of false documents and forgery.

I will only notice that the secs. 478–489 regarding Trade and Property marks, now stand as amended and redrafted by the Indian Merchandise Marks Act IV. of 1889.

And I will add that some of the sections afford us a good illustration of how a *general* criminal law deals with matters, and in so doing

omits some special forms of offence, or some special circumstances, which arise only in the course of a particular business. We shall afterwards see how the Forest Act has found it advisable to make some special provisions about *timber* marks fraudulently used or altered, which the General Law has not contemplated.

### V. Criminal Breach of Contract.

Of the remaining chapters of the Code, I have still less to say. Chapter XIX. includes those occasional cases where a breach of contract may be of such a character that the remedy of damages, &c., from the Civil Court, does not suffice; and the law regards the breach as criminal—as tending to produce an evil effect which extends beyond the mere injury to the individual. For instance, there may be a criminal breach of a contract to carry a person from one place to another (*e.g.*, the case of *pálkí* bearers setting down a traveller, perhaps on a malarious forest road, and running away).[1]

### VI. Offences relating to Marriage.

Chapter XX. refers to offences against marriage; such as bigamy and adultery (the latter offence in India is a criminal one, which it is not by the English law): the woman cannot however be charged as an abettor except under a certain local regulation for the Punjab Frontier Districts.

### VII. Defamation.

Chapter XXI. contains the Criminal law of defamation as distinct from the Civil law of libel.

### VIII. Insult and Intimidation.

Chapter XXII. deals with offences of intimidation and insult, which are not included as offences against the person or property, because they usually do, or may, include threats against character and reputation, or cause alarm. Under this head come the curious forms of duress known in India, whereby a person sits himself down at the door of another, the latter being supposed to become an object of divine displeasure; this is a form of intimidation or putting

[1] Certain special cases of breach of contract by labourers or artisans may be punishable, but for a different reason; such offences are dealt with by a Special Act (XIII. of 1859).

pressure on people, which cannot be tolerated: it is quite immaterial that the evil consequences are imaginary; the act of the coercing party is equally painful to the other, and equally successful in intimidating him into compliance.

The last Chapter contains a single general provision on the subject of *attempts*; which I have reserved for a special notice further on.

# LECTURE X.

## ABETMENT—ATTEMPTS—PUNISHMENT, &c.

### Abetment.

HAVING brought to a close our brief notice of the classes or kinds of offences declared punishable by the Penal Code, it remains to be noticed that there are many cases in which an offence is not merely committed by several persons all of whom are concerned in the transaction as principals, but the offender has been incited to do the act, or has been aided in doing it, by someone else. Whoever *aids* in the commission of an offence, may, under certain circumstances, find that the law treats him *as if* he were himself committing the offence; but generally speaking, "abetment" or participation is an offence which is different from the offence abetted.

In English law, abetment is spoken of in a somewhat different way. The "aider and abettor" is said to be an "accessory"; and he may be an "accessory before the fact" or "after the fact." This distinction is founded on the natural division of acts done in aid of an offence; that is to say, some acts are preparatory to the offence, such as buying poison, procuring implements, arranging and planning details of a scheme of operation; others are subsequent, and tend to prevent its discovery, such as concealing property, harbouring the offender, causing disappearance of marks, &c. In the Indian Penal Code no formal distinction of this kind is made, but the term "abetment" (in general) is defined, and if an act comes under the definition, it is punishable, whether before or after the deed. As a matter of fact, however, it will be found that the majority of cases (which would in England come under the head of "accessory after the fact"), such as concealing a birth, harbouring the offender, not giving information, making away with property, or with marks of an offence, are constituted

distinct offences, in appropriate sections. It will then be understood that in this Code—

(I.) A number of acts of abetment are, for special reasons, treated as specific offences, and as such are described and the penalty is provided (*e.g.*, abetment of mutiny, abetment of suicide, &c.) (see p. 109).

(II.) Other acts of abetment are included under one general head; any act which comes within the definition, and is not made the subject of a special provision, is punishable as an abetment under the general section.

(III.) There are certain special provisions (and this is the only element of difficulty or complication in the subject) relating to those cases in which (*a*) the knowledge or intention of the abettor is different from that of the person abetted; where (*b*) one act is abetted and another is done; where (*c*) an offence consists of several acts conjoined, and one person of a party does one act, and another another.

On these three heads I may now offer some remarks :—

*Ad* (I.) The provisions relating to abetment in general (*i.e.* apart from the several sections which make certain abetments specific offences) are not all in one place in the Code. Thus sections 34, 35, 37, and 38 (in the Chapter of general explanations) belong to this subject, and the general definition and penalty provisions are found in secs. 107—117, 118, 120, and 123.

*Ad* (II.) As to the general subject of abetment, it will naturally be asked what constitutes abetment or participation? Sec. 107 defines :—

(1) By *instigation :*

*e.g.* where A. suggests to B. (who perhaps has otherwise no idea of acting) to do something; he incites him to action in some way. There may be instigation or incitement, by inducing a false belief through *misrepresentation*, or wilful concealment of a fact which the instigator was bound to disclose.

(2) By *conspiracy :* here all the parties have a desire to act, and they agree and consult together as to how they shall proceed.

In abetment by conspiracy, it is necessary that, as a conse-

quence of the conspiracy, some overt act or illegal omission takes place.

(3) By *intentionally aiding* (by any act or illegal omission) in the doing of a thing. The aid may be given either prior to the commission of the offence, or at the time of committing it (both coming under the head of "accessory before the fact"): all that is necessary is that the act done should be in order to facilitate (and should thereby facilitate) the commission of the offence.

Abetment of *any* "offence" is punishable; for by definition, "offence" here includes all offences under Local and Special Laws as well as under the Code. The penalty provided, depends, partly on whether the abetment results in the offence being committed or not, and partly on the gravity of the offence abetted. *If the offence is committed*, the abettor is liable to the full penalty for the offence itself.

This, I may repeat, refers to abetments coming under the general section; the specific cases of abetment are each provided with an appropriate penalty in the section applicable.

If the offence *is not committed*, then the abettor is liable to a less punishment,—graduated according to the character and gravity of the offence abetted (secs. 115, 116). It is here necessary to call attention to sec. 114, which provides that whenever a person who would, *if absent* from the actual scene of the offence, be liable only as an abettor, is *present* at the commission, he becomes liable as a principal.

*Ad* (III.) It is necessary to give some explanations regarding the cases noted under the (III.) head, viz. Where differences in the intention or knowledge (and other special incidents of the kind) are observable in connection with the conduct of the abettor. Sec. 34, for instance, provides that if several persons take action with a *common intention*, and a criminal act is done in furtherance of that intention, all the parties are liable as if each had done the act alone. And sec. 35 adds that if the act done is one which is criminal only when done with a certain knowledge and intention, then the liability extends to all or as many of the party (as the case may be) as had the necessary knowledge or intention (this will appear from the circumstances of the case). When an offence is made up of several acts, and several persons

are concerned,—one doing one act, and another another, in furtherance of the offence, each person is held guilty of the offence itself.

On the other hand, several persons may be engaged or concerned in committing a criminal act, and may be guilty of different offences, by means of that act.

Thus A. is engaged in killing B., and C. comes up and helps A.: here it may be that A. has received grave and sudden provocation, and his offence might be culpable homicide not amounting to murder: C. on the other hand, has had no sudden provocation, but acts out of an old hatred of his own to B. Here C. (although the transaction is the same) would be guilty of murder.

The guilty *knowledge or intent of the abettor* may also have to be considered (sec. 108). A. abets B., a young child or a lunatic, in some offence; A. is guilty, although the person abetted is incapable of an offence by reason of want of understanding (under the chapter of General Exceptions). Or A. instigates B. to murder X. B. succeeds only in wounding X. B. would only be guilty of an "attempt to murder," but A. would be guilty as an abettor of murder (which he intended).

The sections 110—118 may be read in this connection, as giving some further cases which are likely to arise when abetment is in question.

Section 110 deals with the case where the principal acts with one intent or knowledge, and the abettor has a different intent. The abettor, is liable for the offence which would have been committed if the principal had had the same knowledge and intent as himself.

Section 111 contemplates the frequently occurring case, where *one act is abetted* and *another act is done*. And here the abettor is liable for what has actually been done, provided that the doing of it was a natural and probable result of the abetment, and was committed under the influence of the instigation, or conspiracy, which constituted the abetment. For example:—

A. desiring to kill Z., instigates B. a child, to put poison in Z.'s food, providing the poison for the purpose: the child makes a mistake, and puts the poison in Y.'s food, acting however under the instigation: A. is liable exactly as if he had instigated poisoning Y.'s food.

On the other hand, A. incites B. to set fire to C.'s house (in revenge perhaps). B. takes the opportunity to commit a theft in the house on his own account: the theft has nothing to do with the incitement, and A. is not liable for it.

In such cases, it may be a question of some difficulty, whether the act done *was* a consequence, probable and natural, of the act proposed by the abettor, *e.g.*, where a housebreaking is abetted, and in the course of it a murder is committed.

Section 112 is the natural corollary to this; if the additional act committed is a separate and distinct offence, the abettor *may* become liable for both.

Lastly, section 113 deals with the case where the abettor abets an act which is to have a particular effect, and *some other effect* follows: the abettor will be liable for the effect actually produced, just as if he had intended that effect; provided, of course, that he knew the act he abetted to be one likely to produce such a result.

*e.g.* A. abets B. in causing grievous hurt to X. The hurt is inflicted, but X. dies of it; here A. is liable as if he had abetted the murder, provided he knew that the grievous hurt abetted was likely to result in death.

Lastly, let me observe that it is possible to abet an *offence by the public*, or a crowd, or group, or class, of more than ten persons; for this, section 117 has a special penalty.

*Illegal concealment of a design* to commit certain offences is treated of in sections 118—120: this is not exactly abetment, but it is a form of indirect or secondary aid, which is analogous to abetment.

I may take occasion, in connection with the present subject, to mention, that apart from actual instigation or other form of abetment, no one is *criminally* liable for any one else's act, merely *by reason of a relation subsisting* between them, although he may be liable to civil damages (p. 40). A master, for instance, is not responsible for an offence committed by his servant (unless expressly made so by special provisions), nor is a guardian criminally liable for his ward's act.

### Attempts.

Certain "attempts" (which are an inchoate state of crime—a crime begun but not completed) are made specific offences: such are—attempt to wage war against the Queen; attempt to obtain an illegal gratification; attempt to pass counterfeit coin; attempt to put a person in fear of injury or accusation in order to commit extortion; and there are others.

Attempts in general, are punished by section 511; but only with regard to offences under the Code, not under special or local laws. No "attempt" to commit an offence solely punishable under the Forest Act, can be prosecuted.[1] I shall not go into detail on the subject, especially as reference can be made to Dr. Stokes's excellent note (A.-I. Codes, Vol. I. 68 ff.). To constitute an "attempt," section 511 requires the doing of "any act towards the commission of the offence;" and the *general* penalty (*i.e.*, when the attempt is not made a specific offence) is *half* that provided for the completed offence.

Presumably the act "towards" the commission, must be an outward and visible act, which (as a question of fact) is a step towards, or an incipient stage of, the crime: *e.g.*, mere preparation of materials, unconnected with any actual use of them in connection with any property or person, would not be an attempt; nor would a threat or expression of intention, amount to one. What *is* sufficient, must be gathered from the illustrations added to section 511.

### Legal Punishment.

I have for convenience reserved to the last, what the Code places in Chapter III.

The only punishments known to the I. P. Code are (section 53):—

(1) Death.

(2) Transportation (penal servitude in the case of Europeans or Americans). (Section 56.)

[1] Nor is it desirable; for such offences are mostly of a petty character. If justice required that an "attempt" should be prosecuted, it would be in the graver cases which could be brought under the Code (*e.g.*, an attempt to steal valuable logs, or an attempt to set fire to a forest maliciously).

(3) Forfeiture of property.
(4) Imprisonment ("simple" or "rigorous").
(5) Fine.

To these Act VI. of 1864 has added (6) *Whipping*, in certain cases.

The Forest Act also provides confiscation of property obtained, and implements used, in committing a forest offence: this may be said to constitute a special form of penalty peculiar to forest cases, but it will be better to reserve the details till we come to speak of the Forest Law, under which head I shall again have to allude to penalties.

The student will bear in mind that the Substantive law deals only with the nature and amount of punishment, and the cases in which each kind is appropriate; and that the Adjective or Procedure law also has to go into various further matters connected with the amount of penalty the different grades of Courts are competent to award; the *mode* of inflicting the punishment; the *place* of imprisonment; the mode of levying fines; the instrument with which whipping is to be administered, and so forth.

*Death* means always death inflicted by hanging.

*Forfeiture* of all property (including that which may come by inheritance) can be ordered only in a few very grave cases. Partial forfeiture can be ordered under sections 126 and 127 (confiscation of the property which is being improperly used); and so in sections 206 and 207, and under the Merchandise Marks Act (IV. of 1889), where the property wrongly purchased, or in respect of which fraudulent marking has taken place, may be confiscated.

*Transportation* is carried out by deporting prisoners to the Andaman Islands; the Governor-General in Council may appoint the place. If a youth under sixteen is sentenced to transportation, he may be sent instead (by the Court) to a Reformatory School for not less than two, or more than seven, years (Act V. of 1876).

*Penal servitude* is substituted in sentences on Europeans and Americans, so as to conform to the practice at home (where transportation has been abolished). The Governor-General in Council directs which prisons in British India are to be used for the purpose.

*Imprisonment* can be of two kinds, "simple,"[1] and "rigorous," *i.e.*, with hard labour. In Acts after 1868 (by the effect

[1] Simple imprisonment does not necessarily mean that the prisoner in jail is to do nothing; only that he is not liable to be set to "hard labour."

of the General Clauses Act I. of 1868), when only "imprisonment" is mentioned, it means "of either kind," in the discretion of the Court. The Code itself (first enacted in 1860) always specifies the nature of the imprisonment,—sometimes prescribing "simple," and sometimes "rigorous," and sometimes leaving it to the Court (according to the circumstances of the case) to award either one or the other.[1] In case rigorous imprisonment for seven years or more is ordered, the Court may direct that transportation be substituted (section 56). When rigorous imprisonment has been ordered, a limited portion of it (regulated by sections 73, 74) may be ordered to be passed in solitary confinement.

Confinement in a Reformatory School (Act V. of 1876) may be ordered in lieu of imprisonment (in graver cases) for juvenile offenders.

*Fine*, in this Code, is sometimes unlimited, and sometimes limited to a maximum amount named.

In all cases it is required to order that if the fine is not paid, a term of imprisonment shall be undergone in default of payment: this of course terminates as soon as the fine is paid; or a proportionate part of it, if part only of the fine is recovered. The alternative imprisonment may be (as ordered) of any description to which the offender might have been sentenced for the offence, and must not exceed one-fourth of the maximum imprisonment fixed for the offence. If the offence is punishable with fine only, the alternative imprisonment is *simple*, and for a time calculated according to section 67.

Where fine is "unlimited," section 63 declares that the fine must not be excessive (*i.e.*, with reference to the circumstances of the case and the prisoner's means (*e.g.*, whether he has obtained a large booty or profit by the crime, &c.)). An appeal lies on the ground of excessive fine.

Fines when recovered, always go to Government; but there is

[1] It may be convenient to note that in calculating terms of imprisonment, fractions of a day are neglected; and that in a "calendar" month (which is what is counted in awarding "one month," or "six months'" imprisonment), the term expires at midnight of the day of the next (or subsequent) month (as the term may be) numerically corresponding with the day from which the sentence counts as having commenced; and if there is no day so corresponding, then at midnight of the last day of the following month (*e.g.*, sentence of a month's imprisonment on 31st of January would count from midnight of 30th and expire at midnight of 28th February, or in leap year, 29th (for there is no 30th).

a procedure provision which enables a fine or part of it to be applied by the Court in a certain way, of which hereafter.

In the Code, fine alone is sometimes prescribed; sometimes both fine *and* imprisonment. Fine *or* imprisonment is mentioned in one section (254). "Fine or imprisonment *or both*" is provided in a large number of cases.

*Whipping* is awarded chiefly because of its highly deterrent character; and, as provided by law in India, it is not only useful, but entirely unobjectionable.

It cannot be inflicted on females nor on males over 45 years of age; and the Crim Pro. Code (sections 391—5) contains other safeguards as to mode and instrument of infliction, which preclude undue severity. It is not necessary to repeat the details of Act VI. as to when it is applied; but it may be mentioned that it is as an *alternative* punishment in certain cases, and as an *additional* punishment, in certain others, such as second conviction.

Boys may be sentenced to flogging instead of to other punishment; but then it is with a light cane by way of school discipline.

Flogging can only be ordered for an offence under the Code (unless of course a special law contains an express provision, as do the Cantonment Act, Criminal Tribes Act, &c.). The Forest Act contains no such provision; consequently flogging can never be ordered (not even to boys) for any offence constituted solely by the Act, *i.e.*, not coming under the Code also.

### *Some Special Incidents of Punishment.*

There are some circumstances which *aggravate* offences; and these are usually treated in the Code, as entering into the constitution of a new or separate offence. As, for instance, where "housebreaking" is done by night, or where a riot is rendered more serious by the use of deadly weapons. But it may be that the existence of some particular circumstance, is of itself an aggravation which may attach to any offence, enhancing its penalty, without altering its character or the section under which it is charged. Of this we shall find instances in the Forest Law.

The Indian Penal Code recognizes the case of relapse (*récidive*

of French law). Provision is made by section 75, that any person who has been convicted of any offence under Chap. XII. (Offences relating to Coin and Stamps) or Chap. XVII. (Offences against Property) (theft, robbery, breach of trust, receiving of stolen property, cheating, mischief, criminal trespass, &c.)—the said offence being punishable with imprisonment of three years or upwards, and is again convicted of *any offence* punishable under these chapters, and which is of the same magnitude as regards punishment, he may be transported for life, or receive double the amount of punishment otherwise awardable (up to a limit of ten years in the case of imprisonment).[1] The Whipping Act also (as I have noted) provides that flogging may be *added* to other punishment in certain cases of second conviction (of the *same* offence, however).

Under this head I might also consider the case of a number of punishable acts committed in one transaction. This has already been dealt with (see pp. 97, 8). I need therefore only here refer to section 71, Indian Penal Code (and sections 35 and 235 of the Crim. P. Code must in practice, be taken with it). Where the acts do *not* form a single transaction (and get treated as one offence) and there are several sentences, one begins on the expiry of the former: there is, however, a proviso against the aggregate of punishments exceeding a certain total or maximum.[2]

### *Limitation as regards Time of Prosecution.*

Lastly, I may mention that our criminal law does not recognise any period of limitation as doing away with an offence or preventing its prosecution.

In theory there is no reason why such a limit should be set; and although it would be absurd that a petty offence should be raked up against a man after many months or years, practically such a thing never happens: the proof of a small offence would be sure to disappear, and the magistrate would also have excellent ground to refuse a summons: it is therefore judged

[1] See some special remarks on the subject of aggravation, in the lecture on the Protection of Forests by law.

[2] Nothing is said in the Code about "concurrent sentences;" that is, sentences which are separately pronounced, but are ordered to take effect *concurrently*. These are often passed in England. The effect is so far real, that if on appeal one sentence were quashed, the other would remain in force.

better to leave the subject entirely alone, except in some special cases where prosecutions are expressly required to be instituted within a certain period.[1]

*General Remarks on Prosecutions.*

It is perhaps unnecessary to say that in all grave cases, care is required, and advice of a lawyer. as to the charge to be preferred, and what is necessary to be proved.

Generally it may be observed that the prosecutor must be prepared to make out *affirmatively* the charge he makes; he cannot make a charge and (in effect) say, "I cannot prove it very well, though I have the strongest suspicion: but you defend yourself, and, if your defence is not complete, that will show you are guilty." It is only when an *offence* is *primâ facie* completely established, that the accused must either clear himself or be convicted.

For example, a man's cottage near a river is found roofed with water-worn sleepers. It is of course likely enough that he has misappropriated them, because it can be shown that it would not have paid him to employ sleepers that he had *bought*, for such a purpose. But the prosecution cannot simply charge the man and say, "I will stand by while you prove how you got the sleepers" It should establish first, such a strong case that the sleepers could not have been bought and must have been misappropriated from stranded pieces which he had no right to touch, that the burden of proof to the contrary, is laid on the accused.

Whenever there is *primâ facie* an offence, but the act is excused if it comes within the terms of some General Exception in the I. P. Code, or some special exception or proviso contained in the Code or other law defining the defence, the

[1] Instances are under the Excise Act, the Arms Act, Police Act, the Copyright Act, and the Act for Protecting Wild Elephants (VI. of 1879). There is a complete list of Acts in Anglo-Indian Codes, Vol. II., pp. 14–16.

The Scotch, French, and some German laws are different. The Bavarian Forest Law (Art. 71) requires forest offences to be prosecuted within one year from the day of perpetration. The French Code For. (Art. 185–187) (with some exceptions) fixes three months as the limit, if the *procès verbal* specifies the delinquent, and six months if it does not; the "prescription" runs from the date on which the offence was formally recorded (*constaté*). If there has been no *procès verbal* at all, the case is held to come under the ordinary criminal law, which gives one year or three, according to the gravity of the offence.

accused must plead it and prove the exception. Thus, the prosecution need not charge nor prove that the offender was of sound mind, that there was no grave and sudden provocation, &c., for if the accused raises that as a defence, *he* must allege and prove it.

These matters, perhaps, belong more to the Code of Criminal Procedure and the law of Evidence, but they are more likely to come to notice if brought in in this place. Sec. 185 of the Evidence Act (Act I. of 1872), and sec. 221, &c., Cr. P. Code, should be referred to.

## (II.) CRIMINAL LAW (Adjective or Procedure).

*CONSPECTUS OF SUBJECTS.*

1. PRELIMINARY REMARKS ON THE CRIMINAL PROCEDURE LAW. DEFINITION OF TERMS USED.

2. CONSTITUTION AND POWERS OF CRIMINAL COURTS.

3. GENERAL PROVISIONS OF THE LAW.
   - (*a*) Duty of the public to aid the magistrate.
   - (*b*) Of arrest (including escape and retaking).
   - (*c*) Processes to compel appearance of the person.
   - (*d*) Process to compel production of *documents* or other *property*.

4. THE PREVENTION OF OFFENCES.

5. THE INVESTIGATION OF OFFENCES BY THE POLICE.

6. PROCEEDINGS ON A TRIAL IN CRIMINAL CASES.
   Local jurisdiction. Initiation of cases.
   - (*a*) Formal inquiry before the magistrate (for committal to Sessions, &c.). Trial of a "warrant case." Provisions relating to the "charge."
   - (*b*) Trial of a "summons case."
   - (*c*) Trial by "summary" method.
     (Trial before High Court or Court of Session not gone into.)
   - (*d*) General incidents of a trial.
   - (*e*) Mode of recording evidence.
   - (*f*) The judgment.

7. PROCEDURE IN AWARDING AND EXECUTING SENTENCES.
   - (*a*) Imprisonment.
   - (*b*) Fine and how it is recovered.
   - (*c*) Imprisonment in default of payment of fine.
   - (*d*) Cumulative sentences.
   - (*e*) Whipping.
   - (*f*) Remission of sentence or pardon.
   - (*g*) Second conviction on the same facts not allowed.

8. APPEAL AND REVISION.

(*a*) When there is, and when there is not, an appeal.

(*b*) Powers and action of the Appellate Court.

(*c*) Revision and reference.

9. SPECIALLY CONDITIONED PROCEEDINGS OF CRIMINAL COURTS.

(*a*) In cases of European British subjects.

(*b*) Certain other cases.

(*c*) In cases of offences against public justice, contempt, &c., &c.

10. ON THE SUPPLEMENTARY PROVISIONS OF THE CODE.

# LECTURE XI.

## CRIMINAL PROCEDURE.

### Introductory.

THE last Lecture brought to a close our brief sketch of the principles of the Criminal (Substantive) Law as exemplified in the Indian Penal Code. We now turn to an equally brief study of the more essential points of the Criminal Procedure (Adjective) Law.

The Substantive law could not be applied and worked without the aid of a Procedure law. In India the Criminal Procedure Code is Act X. of 1882, as amended by some subsequent Acts.[1]

It has been remarked that "the Law relating to Criminal Procedure is more constantly used, and affects a greater number of persons, than any other law." This, indeed, might be expected from the wide scope of the Code and the variety of subjects with which it deals.

It must not be supposed that Procedure law is satisfied with constituting Criminal Courts (for the trial of offences) and describing the various forms of trial held before those Courts. That is only one branch of the subject of Procedure, though a very important one. Procedure law goes much further: it looks to the conduct of individuals before offences are committed, and provides for the *prevention* of offences; and with this view it provides for the regulation of public life and traffic so as to obviate the occurrence of nuisances, obstructions to roads, riots, affrays, and the like. It contemplates the discovery and *investigation* of offences with a view to their satisfactory trial: and to this end considers the duty of the public or of particular classes or persons, in furnishing aid and information to the magistrate and the police authorities; it has also to provide the

[1] The first Criminal Procedure Code was passed in 1861, then a revised one in 1872, and finally the present law. The details of the history, and particulars of the amendments, are clearly stated in Dr. W. Stokes' Introduction (A.-I. Codes, Vol. II.).

machinery by which criminals and offenders are brought before the Court, and property or documents searched for and produced. To this head belongs the series of provisions regarding the summons, the warrant of arrest, and warrant of search. Even when the form of *proceeding at trials* (whether formal or summary) has been prescribed, and the question of *appeals* and *revisions* has been disposed of, there are still many subsidiary matters requiring consideration, such as the expenses of witnesses and the costs of trial; compensation to the injured party, penalty for frivolous complaints; the right of accused persons to be defended by counsel; the power of transferring cases from one court to another; and the mode of carrying out or inflicting sentences of punishment.

There are also many general regulative provisions which are brought under the head of criminal procedure, because the Magistrate rather than the civil Judge, watches over their execution. I need only instance, in this connection, inquests into the cause of death, and the protection of property in certain cases.

And this is a convenient point at which to notice that very often, for practical purposes, a knowledge of the Procedure law is necessary to complete, if I may so say, the treatment of a subject dealt with also by the Penal Code.

An example may be obtained by comparing sec. 71 of the Indian Penal Code with secs. 35, 235 of the Criminal Pro. Code. In some cases, a *series* of acts, though each act, strictly speaking, is an offence, is not allowed to be punished otherwise than as *one* (combined) offence. Otherwise (*i.e.*, when this rule does *not* apply), as many offences as are legally committed, consecutively or in the series, can be separately punished. But this by itself, might lead to confusion at trials as well as to unreasonable cumulative sentences: accordingly the Procedure law steps in to prescribe both how the trial and the joining of acts in one charge, is to be arranged, and how cumulative sentences are limited.

So, again, the Substantive law informs us that when a Court pronounces a sentence of imprisonment that is to take effect in default of payment of the fine awarded, the term is not to exceed a certain maximum with reference to the term of imprisonment

provided as the substantive punishment for the offence (p. 133); the Crim. Pro. Code goes further and requires a limit of the term with reference to the powers possessed by the Magistrate trying the case and passing sentence.

These introductory remarks might have been considerably extended; but what has been said will suffice to show you that a study of the Procedure law is of practical value for our own purposes; and therefore I may proceed at once to give you an outline of the law on the most important points. The order of subjects in the Code itself may, as a rule, be most conveniently followed for this purpose.

**Preliminary Matters (Part I. of the Code).**

As regards the extent of the operation of the Code, it applies to all British India, and governs all Criminal Proceedings whatever; without, however, annulling any special provision enacted, or special jurisdiction conferred, by any other law in force.

As usual, the Code has a series of definitions which should be read. It is only necessary specially to call attention to the term "Offence" which is here used for *all* offences, *i.e.*, acts or illegal omissions prohibited or declared penal by *any* law: there is no variety or restriction such as we noticed in the I. P. Code. This is obviously necessary from the nature of the law which prescribes the procedure followed in all trials for all kinds of offences (sec. 5).

The term "High Court" is used to mean the highest court of criminal jurisdiction in any province, for the purpose of appeal or revision, or other purposes as defined in the Code. In Bengal, the N. W. Provinces, Madras, and Bombay, the highest Court in the Province is already officially called a "High Court," being established by Royal Charter. In the Panjáb, the Court having (generally speaking) the same functions, is called the "Chief Court" because there is no Royal Charter and the judges are appointed by the Governor-General in Council. So in Lower Burma. In other provinces there are "Judicial Commissioners" and perhaps other officials differently styled; but under the Code they stand in the place of the "High Court," either generally or for certain purposes therein stated.

The term "European British Subject" is defined, as there are certain legal provisions relating to persons of this class, and it is necessary to state what degree of descent (and so forth) constitutes a man a *European* British Subject. There must be a limit; it would lead to great difficulty of proof, *e.g.* if the fact that any male-ancestor, however remote, happened to be an Englishman or a Scotchman, would constitute the person a "European."

I will only allude to one more term. The word "place" is conveniently employed as a short term to *include* (not only a spot of ground, but) also a house, a building, a tent, or a vessel (ship, &c.).

Other definitions will be more conveniently noticed in the course of our further remarks, where they come into use.

### Constitution and Powers of Criminal Courts.

Part II. of the Code naturally divides its provisions under the following heads:—

(A) The constitution of Courts.

(B) The (Criminal) Judicial *Districts* and *Divisions* within which the Courts have jurisdiction.

(C) The powers of the various Courts and grades of Magistrates within their local jurisdiction.

(A) The Code does not create "High Courts;" for these exist either under a Royal Charter, or under an Act of the Legislature; but it defines their powers and regulates their proceedings in Criminal cases.

It *actually constitutes*:—

(1) Courts of Session (Courts of Session Judges).

(2) Courts of Presidency Magistrates (in the "Presidency towns," Calcutta, Madras, and Bombay).

(3) Courts of ordinary Magistrates in three classes—1st class, 2nd class, and 3rd class, respectively.

As regards *local jurisdiction*, it is enough to mention that practically there are the following:—

1. The jurisdiction of the "High Court" extends not only

to the trial of any case whatever over the whole province,[1] but to the supervision and control of all Criminal Courts, to the hearing of final appeals, and the exercise of powers of revision.

2. The Presidency Magistrates', existing only in the towns above mentioned, need not engage our attention.

3. The Courts of Session hear the graver kind of cases, which are always "committed" to them, after preliminary inquiry, by a magistrate; they try these cases with the aid of Assessors, and, in some cases (where the Government has directed it), with Juries.[2] They also exercise powers of appeal from Magistrates in their Division. Their local jurisdictions are the "Sessions Divisions."

4. There are "Districts" which are conterminous with the ordinary administrative "Districts." The chief officer is the "Magistrate of the District." Large districts are sometimes aided by being further split up into "Subdivisions of districts," and the Magistrate of such a subdivision becomes a District Magistrate for his subdivision; having a District Magistrate's powers, but exercising them in general subordination to the Magistrate of the (whole) District.

All other Magistrates, who may individually possess powers of the 1st class, 2nd class, or 3rd class, according to their standing and experience, are assistants to the Magistrate of the District. They may have various local official titles, as "Joint Magistrate," "Assistant Magistrate," "Deputy Magistrate," "Special Magistrate." Sometimes native gentlemen of rank, and estate holders, do good service as "Honorary Special Magistrates" in their "Jágír" (or other) estates. Others form "benches" for disposal of small cases in towns (secs. 14, 15). But as regards the procedure law, all are "Magis-

[1] Theoretically, of course, a High Court *could* try any kind of case, though in practice it only hears an exceptional class of original criminal cases.

[2] With regard to ordinary criminal trials (*i.e.* other than those in the High Courts), the system of trial by jury depends for its success upon the existence of a sufficient degree of intelligence and freedom from caste prejudice (and the like), in the class of persons available to be called as jurors. It is therefore necessary to leave the Executive Government to determine whether any particular district is fit for its introduction, and in what classes of cases it should be adopted.

trates" (subordinate to the "District Magistrate"), and of one or other of the three classes as regards powers.

A special office—that of "Justice of the Peace"—is also mentioned. It was originally required in days when the English servants of the E. I. Company began to reside in the districts outside the old centres of trade—the Presidency towns, and it was thought right that they should only be subject to a jurisdiction similar to that to which they would have been amenable in their own country. "European British Subjects" are still only liable to be criminally dealt with by Magistrates being Justices of the Peace.

The office was formerly restricted to Magistrates who were themselves European British subjects: but it is now also conferred *ex officio* on certain of the higher criminal authorities, whatever their nationality; because it is justly thought that any officer who is worthy to hold these responsible offices, must also be fit to be a Justice of the Peace, *i.e.*, to perform the special and very occasional duties of such an officer. The *ex officio* Justices of the Peace are, all Judges of High Courts, all Sessions Judges and "District Magistrates" (sec. 25). Others are appointed by notification, as provided by secs. 22 and 23. It is unnecessary to repeat the details of these sections.

It may perhaps be asked, why several classes or grades of Criminal Court, with different degrees of power, are necessary? If all persons selected for duty as Criminal Judges were equally able, experienced, and instructed, it might not be necessary; but practically, it is found desirable to graduate powers according to official standing, length of service and experience, and other circumstances; also to subject the lower grades to more supervision, and make their decisions more open to correction by appeal.

In practice, therefore, a few only of the gravest cases against European British subjects are tried by the High Courts (and with the aid of a Jury). The great bulk of grave offences occurring among natives of the country (and offences of secondary gravity of E. British subjects) are sent up to the Sessions Courts; all cases, for example, involving a sentence which may be death or transportation for life (in European cases, offences involving a sentence over three months and not exceeding one year's imprisonment).

All other cases are tried by Magistrates; the graver ones by Magistrates of the first class: while lesser cases can be disposed

of by Magistrates of the second class, and petty ones by those of the third class.

I will mention presently the definite limits of power in each class.

The graver cases that come before a High Court or Sessions Court, are not taken up on complaint (or police report) made directly to the Court, but after a "committal;" *i.e.*, after a preliminary proceeding before a properly authorised Magistrate, the object of which is to ascertain that there is a *primâ facie* case sufficient to go to trial, and to have all the evidence ready.

Magistrates, as we shall see, take up cases either (1) on direct complaint to them, or (2) on report (after investigation) by the police.

As regards the powers of Magistrates, they are of two kinds:—

1. Judicial powers, *i.e.*, authority to try a certain class of cases, and to pass a certain sentence.
2. Executive criminal powers, *i.e.*, to do various acts either directly connected with judicial cases, or required for the general maintenance of peace, and the prevention of offences.

(1) As to the *class of cases* which each grade has jurisdiction to take up:—Theoretically, High Courts and Courts of Sessions can try all classes of cases; (the latter cannot, however, try European British subjects for offences threatened by law with the penalty of death or transportation; nor for any other offence which though in itself cognizable by them, would require (practically) a sentence exceeding one year's imprisonment).

Magistrates of the different grades can try such *offences under the I. P. Code*, as are shown to be so triable in the 8th column of the 2nd Schedule to the Crim. Pro. Code.

In the case of *offences under other laws*, the special Act declaring them will usually itself specify which grade of Magistrate can try. But in case it does not, the general rule (sect. 49) is stated, that a *third* class Magistrate cannot try an offence for which the maximum punishment may extend to *one* year: A second class Magistrate cannot try one for which the maximum

may extend to three years, nor a first class Magistrate one in which the maximum penalty *exceeds* seven years.[1]

Accordingly, in the large class of special law offences (*e.g.*, under the Forest Act) punishable with not more than six months' imprisonment, *any* Magistrate can ordinarily try them; but in the Burma Forest Act there is an express provision that third class Magistrates are not to try Forest cases unless specially authorised.

In some Provinces, sec. 30 allows a special power to be given to District Magistrates—a power which relieves the Courts of Sessions from an excess of work.

With these special powers, the District Magistrates may try *all* cases not punishable with death. The trial is with the ordinary (but full or formal) procedure of a Magistrates' case (*i.e.*, without jury or assessors); and the sentence must not exceed seven years' imprisonment or transportation (also fine and whipping may be awarded according to law). But if the sentence of imprisonment (in any one case) exceeds *four* years, it is subject to confirmation by the Sessions Judge (sec. 34).

It may be mentioned that whenever a prisoner is charged with an offence (of a certain class) after a previous conviction (sec. 75, I. P. C)., and it appears to a Magistrate that he is an habitual offender, sec. 348 provides that he is to be sent for trial to the District Magistrate with powers under sec. 30 (if there is one) or to the Court of Sessions.

The judicial powers just considered, viz., as to the *class of case triable*, are one thing; the actual *powers of sentence*, are another. Magistrates continually try cases in which they would not be competent to inflict the whole sentence which might be awardable under the Penal Code.

As to powers of sentence:—

1. High Courts can pass any sentence authorized by law.
2. Sessions Judges can also pass any sentence; but if the sentence is of death, it must be confirmed by the High Court.

[1] It is needless, perhaps, to remind the reader, that though the maximum imprisonment provided in the section defining and dealing with the offence, is here (and in other cases) the standard by which to judge what class of Court can try it, this does not in any way empower the magistrate to inflict the whole maximum sentence: he can only give sentence up to the limit of his own class powers, to be mentioned next.

Joint Sessions Judges or Additional Sessions Judges have the same power. Where there is no Joint Judge, but an Assistant Sessions Judge is appointed (to help in a heavy Sessions Division), there are some restrictions on his powers specified in sec. 31.

3. Presidency Magistrates and Magistrates of the first class, can pass a sentence of *imprisonment* (*i.e.*, of either kind) up to *two years* (including solitary confinement as provided by law); also *fine* up to 1,000 Rupees, and *whipping*.
4. Magistrates of the second class; the same; but up to *six months'* imprisonment, and 200 Rupees, as the limit of *fine*.
5. Magistrates of third class; imprisonment up to *one month*, and fine up to 50 Rupees. They cannot award solitary confinement or whipping.

The general limit of powers does not prevent a Magistrate passing a sentence which involves a combination; as, for instance (sec. 33), where, having sentenced to imprisonment and fine, he has to specify an *alternative* sentence of imprisonment to be undergone in case the fine is not paid. This may be in addition to the amount of his powers. In general (by the Substantive law) the limit of this term "in default" is one-fourth of the term provided for the offence; but the Procedure law further adds that if the Magistrate has awarded substantive imprisonment as well as the fine, then the additional imprisonment (in default of payment) cannot exceed one-fourth of the Magistrate's own powers.

And where by reason of there being a conviction, at one time, of more than one offence, two or more sentences are passed, or when one transaction (which is the subject of trial) is made up of several parts, each calling for a distinct punishment (sec. 71, I. P. Code *not* applying), so that the several sentences form a *cumulative* punishment; sec. 35 provides that the fact of the *aggregate* sentence exceeding the Court's ordinary limit of power, does not necessitate a new trial before a Court with larger powers; but the sentence will be lawful provided that it does not amount to more than *twice* the ordinary powers, and also that under any circumstances, an aggregate sentence of imprisonment is not to exceed fourteen years.

It is usually known beforehand, either from the preliminary investigation of the Police, or from the examination of the complainant, whether the case is a grave one or a petty one; and so the Magistrate, in distributing cases for trial (sec. 192) would naturally use his discretion in sending cases to Magistrates, not only who have power to try, but whose class is such that *primâ facie* they will be able to award a sufficient sentence. Nevertheless, the law has made a convenient provision (sec. 349) that if a Magistrate *of the second or third class, having jurisdiction to try* a case, finds that a severer sentence than he can give, ought to be passed, he can find the accused guilty, and *record no sentence*, but send his proceedings to the District (or Subdivisional) Magistrate to whom he is subordinate; and this Magistrate may, if he thinks right (with or without recalling the witnesses, or making further enquiry), pass such sentence as he thinks fit, within the limit of his own powers.

This latter observe, only relates to cases where the Magistrate *has* jurisdiction to try the case, only the punishment required is more than he can award. In any case, if a Magistrate, on hearing the evidence, thinks it establishes an offence which he is *not competent to try* (sec. 346), he is bound to stay proceedings and submit the case to the Magistrate to whom he is subordinate; this officer will then refer it for trial to some competent Court, or hear it himself.

(2) The Executive powers of Magistrates, are chiefly required by the District and other grades of assisting Magistrates; and all the *ordinary* powers of each grade are specified in Schedule III. of the Code, a glance at which will at once indicate their nature. Besides these ordinary powers, Schedule IV. gives a further list of powers which *may* be *additionally* conferred by the proper authority.

It is not expected that a Forest Officer will carry in his head the whole of these details, but it may be useful to him to know where to look for information in cases where he has to make any application to a Magistrate. For example, he is likely, on occasion, to have to apply to a Magistrate to *entertain a complaint* of an offence, which is not one which, as a forest offence under the Forest Act, he thinks it necessary for the Police to take up; he may also want to apply for a *search*

*warrant*, or he may want an order to the *Police* to make an *investigation* into an offence in which they cannot by law act without such order. In these cases, it is of no use going to a second-class Magistrate to entertain a complaint, unless he has been invested with powers, or is in charge of a sub-division. It is no use asking a third-class Magistrate for an order to the Police to investigate (sec. 155); he has not, and cannot get, such powers. A search warrant (sec. 96) can be granted by any Magistrate.

Shortly, *everything* can be done by a Magistrate of the district, and *most* things by a Sub-divisional Magistrate, the difference being in certain more important and exceptional functions; and in the matter of appeals, Sub-divisional officers (being Magistrates of the first class) may be specially empowered to hear appeals from Magistrates of second and third class.

All Magistrates in a district, of whatever grade, are subordinate to the Magistrate of the district (sec. 17). Magistrates in the sub-division are subordinate to the Sub-divisional Magistrate, subject to the control of the District Magistrate (sec. 17, para. 2).

Magistrates of a sub-division are subordinate to the Sessions Court, only to the extent and for the purposes expressly provided by the Act.

### *General Preliminary Provisions.*

The rather vague heading to Part III. of the Code becomes intelligible, when we see that the object is to establish certain preliminary rules and to declare certain duties, which are necessary in order to render the action of the criminal authorities in dealing with offenders and offences, effective. Several of these matters might have been perhaps brought in under other heads; but it was desirable to have them explained early in the Code, so as not to involve references forward, *i.e.*, to sections not yet read.

The first subject (Chap. IV.) is the *aid* which the Magistrate is entitled to ask and to receive, from the public generally or from certain classes of persons.

*Every* individual is bound to assist a Magistrate (or a Police Officer) who makes "a reasonable demand" for his aid:—

(*a*) In effecting an arrest.

(*b*) In preventing a breach of the peace.

(*c*) In preventing an injury to any public property or to a railway, telegraph or canal.

(*d*) In suppressing a riot or an affray (pp. 109, 110).

It is also the general duty of all persons whatever (sec. 44) "forthwith" to give information which they may possess regarding the commission, or the intention to commit, any of the graver class of offences specified in the section, such as treason, murder, housebreaking, robbery, &c.

Landowners, and the headmen of villages, having received special security of title from the law, as well as special emoluments of office, are justly held liable for special duty in suppressing crime such as indicated in section 45.

Another general subject is the *arrest of offenders;* on this the whole criminal administration depends. And "arrest" naturally includes the action to be taken if an arrested person escapes and has to be retaken. It also includes a determination of questions which arise (on making arrests), such as the right of search, the right to enter houses, private apartments, and to break open doors. The provisions on these matters are contained in Chap. V.

### *Rules regarding Arrest.*

As to the formal act of making an arrest with due legality' whoever has the power to arrest (of which presently) must either touch or confine the body, (which is a symbol of the completion of the legal act)[1] unless the person submits to custody. Where the arrest is by warrant, the substance of the warrant must be stated to the person arrested, and (if required) the warrant shown (sec. 80). If forcible resistance is offered, any means[2] necessary to effect the arrest may be employed. But this does not extend to causing death, *except* the person is accused of an offence punishable with death or transportation for life, (and then of course only if it is absolutely unavoidable).

It may be necessary to enter buildings and search for an offender: any person in charge of the 'place' (p. 143) is bound to allow ingress for this purpose; but the process must be carried

[1] The arrest may be made at any time of day or night, or on a Sunday. (W. Stokes.)

[2] That is any means which a reasonable, prudent person would employ, with reference to the character of the resistance and the circumstances of the case.

out either under a warrant of arrest, or by a *police officer* legally entitled to arrest without a warrant (secs. 48, 49). If necessary, any outer or inner door or window may be broken open. Sec. 48 adds precautions to be taken (in India) where females are secluded.

Whenever a person is arrested without a warrant, or under a warrant which does not permit bail,[1] or when it does permit bail but the person arrested cannot furnish it, a police officer may search the prisoner and take charge of all that is found on him except his necessary wearing apparel.[2]

Then follow provisions determining under what circumstances arrests may be effected by a police officer *without a warrant*, or by a private person without a warrant. The sections (54, *ff.*) may be read for the details. In principle, the police can arrest without warrant :—

(1) In those graver offences said to be "cognizable," *i.e.*, specified in the Schedule as cases in which the police can at once take action.

(2) Also in the case of persons found with implements of housebreaking.

(3) Persons who have been proclaimed offenders, *i.e.*, persons accused of a grave (non-bailable) offence who have eluded pursuit.

(4) Persons in possession of stolen property.

(5) Persons obstructing a police officer in execution of his duty.

(6) Persons who escape, or attempt to escape from custody.

(7) Any suspected deserter (from army or navy).

(8) Where the person refuses to give his (true) name and address—even in a non-cognizable case (sec. 57). A certain further power is given (sec. 55) only to *officers in charge of a police station*.

It is desirable also to explain that *any person* (without a warrant) (sec. 59) may arrest a person who—

[1] The subject of bail, which means finding security for appearance instead of being kept in custody, is dealt with later on.

[2] Observe that a *police officer* does this; where the arrest is made by a private person, that person must hand over the prisoner first.

(1) In his presence commits a non-bailable and cognizable offence.

(2) Is a proclaimed offender.[1]

There is a special power of arrest given to Forest Officers (by the Forest Act); and several special laws (Canals, Customs, Excise, Railways, &c.) give certain powers of arrest to the Departmental officers.

Then follow some necessary provisions (secs. 60, 61) to prevent any abuse of these large powers of arrest. Where there is no legal right to offer bail, the arrested person must "without unnecessary delay" be taken before a Magistrate having jurisdiction in the case, or before the officer in charge of a Police Station; and generally, an arrested person must not be kept in police custody for more than twenty-four hours without obtaining a Magistrate's warrant of remand. This is an important security against wrongful confinement.

If a person escapes, he may at once be pursued and retaken in any part of British India.

### *Processes to Compel Appearance.*

As these provisions for arrest without warrant, only relate to the gravest class of criminal cases, or to some offences under special laws, there remains a very large number of cases in which some milder means have to be provided for bringing offenders before the Magistrate. And as the law never puts forth greater force than is needed, these means are graduated *according to the class of offence.*

For procedure purposes, all offences are either "bailable"[2] or "non-bailable." And they are further classified with reference to the provisions regarding the means of procuring the attendance of the accused.

The case being "bailable" (sec. 496) means that the person

[1] Similar powers are given under certain sections of the Arms Acts (1878), &c. The person making the arrest must at once "make over" the prisoner (*i.e.*, must take him himself or send him by his servant) to a police officer.

[2] "Bail" refers to a formal promise (contained in a *bond* in prescribed form) to appear whenever required. It is backed by the undertaking of one or more (approved) persons who agree to be liable as sureties in a *certain sum of money* (as required) that the accused person does not abscond, and does appear as promised. "Recognizance" is a similar bond but without securities; *i.e.*, containing only a personal promise to appear, subject to a penalty in case of default.

after being brought up, is *entitled*, instead of being kept in custody while his case is pending trial, to be set free on giving bail as required by the Magistrate or Police Officer. When an arrest in such a class of case, is made by warrant, the warrant *may* specify that bail is to be taken (see p. 155). In minor (bailable) cases, the Magistrate or Police Officer can accept the prisoner's own recognizance or bond to appear.

In "non-bailable" cases, the person has *no right* to offer bail after he is brought up; but a Magistrate may direct him to be let go on bail, under the circumstances of doubt stated in sec. 497.[1]

And offences are further classified according to the mode by which the prisoner is brought up. If they are so grave that the prisoner may be arrested without warrant, they are "cognizable" cases. Most cognizable cases are also non-bailable, but some few are of such a character that bail is allowed.

The next less grave offences, are "warrant cases," *i.e.*, a Magistrate's warrant of arrest must be obtained; mostly they are bailable, but there are some exceptions.

The lesser class of offences are those in which it is sufficient to issue a formal order, called a "summons," for appearance. If the summons is disobeyed, a warrant can be issued: (and so it can in the first instance, if there is reason to believe that the accused will abscond, &c., so that a summons would be ineffective).

The appearance of witnesses in criminal cases is also obtained by "summons."

"Summons cases" are nearly always bailable.

The Second Schedule at once shows (for each offence *under the I. P. Code*) to what class each case belongs; and generally, by definition, a "Warrant Case" includes all in which the imprisonment specified exceeds six months, while "Summons Case" includes all in which it is less.

The *summons* is in writing in an established form and in duplicate; it is usually served through a Police officer (sec. 68). It is served personally, by exhibiting the original document and

[1] All the details about *bail*, its amount, form, &c., are collected together in one place towards the end of the Code, among the supplementary provisions.

delivering or tendering the copy or duplicate. If personal service is not possible because the accused cannot be found, the duplicate is left with some *adult male* member of the family *residing with* the accused; and this person must *sign a receipt* for it (sec. 70). If this method is impracticable, then one copy is affixed on some conspicuous part of the house where the accused ordinarily resides (sec. 71).

Where a summons is applied for to be served beyond the jurisdiction of the Magistrate, section 73 must be referred to.

Summons to persons "in the active service of the Government or of a Railway Company" may be sent to the head of the office for service (sec. 72).[1]

The *warrant* also is in writing, signed and sealed by the Magistrate, in an established form. A warrant once issued remains in force until it is cancelled by the Court, or until it is executed. In case of a *remand* during enquiry, there must be an express warrant to commit to custody under sec. 344.

A Magistrate *may* also direct, in issuing the warrant, that bail may be taken (*i.e.*, that a bond with an indicated number of securities for a specified amount of money, for his attendance, be executed), and then, when the person is apprehended, if he gives the required bail, he may be let go at once (sec. 76).[2]

Warrants are *ordinarily* directed to a *Police officer*, but *may* be directed to any one (sec. 77, see also section 78).

It should be borne in mind that *any* person *who is present in a Criminal Court* may be then and there arrested (as if a warrant had been issued) for any offence he may have committed (sec. 351); and any Magistrate may direct the arrest *in his own presence* of any one for whose arrest he is competent to issue a warrant (sec. 65).

For warrants to be executed outside the Magistrate's own jurisdiction, reference to sections 82 and 83—5 of the Code must be made.

In any case where a warrant cannot be executed by reason of the

[1] Soldiers on the march cannot be summoned as witnesses. At other times they would be summoned through their commanding officers.

[2] This will usually be done, where the offence is of the bailable class, *i.e.*, where the person on being brought up under the warrant, will have a right to be let go free on bail, pending further proceedings. But the direction to bail, *in the warrant*, is purely a matter of discretion of the Magistrate.

person absconding or concealing himself, a *proclamation* is read at some conspicuous place of the town or village where the accused resides, requiring him to appear within a period fixed but not less than thirty days. The proclamation is then affixed in some conspicuous part of his house, or at some place in the town or village; also a copy is posted at the Magistrate's court-house (sec. 87). At the same time *all* property is liable to attachment (sec. 88). If the accused does not appear within the time fixed, it may be sold and forfeited to Government, after six months; (unless it is perishable, when it may be sold at once and the proceeds treated as the property). Within two years, however, if the person appears and shows that he did not abscond or conceal himself for the purpose of evading justice, he can get the property (or the sale-proceeds) back.

When a warrant is executed, the substance is to be notified to the person, who may demand to see the warrant itself (sec. 80).

In executing a warrant, all the provisions about arrest generally (sec. 46, *ff.*) (p. 151), about the form of arrest, breaking open doors, searching prisoners, and the like, are applicable as they are in arrest without warrant.

### *Process of Search for Property and Documents.*

Naturally connected with the subject of arresting or summoning the *person* of an offender, is that of searching for *property* or *documents* connected with criminal cases. Chap. VII. accordingly proceeds with the subject of "search warrants."

In general, a search warrant may be issued—

(*a*) when a summons *to produce* a document or thing (sec. 94) has not been, or is not likely to be, obeyed;

(*b*) where the Court considers that the purposes of any enquiry, trial or other proceeding under the Code, will be served by a general search or inspection.

The warrant may be either *general, i.e.*, to search any house or place within the jurisdiction of the Magistrate of the district, or *restricted* to the search of a particular place, or even a *specified part* of such place (sec. 97).

Search warrants are usually directed to a Police officer; and generally, the provisions relating to ordinary warrants, apply (sec. 101).

In any case the property found is to be taken to the Magistrate, as directed in sec. 99.[1]

Persons residing in, or in charge of, the place to be searched, are bound to allow ingress (sec. 102); and there is the same power as before described, of breaking open door or window if ingress cannot be had otherwise, and after due demand. So in searching a *zanána*, opportunity must be given for women to withdraw, but with precautions to prevent the clandestine removal of property. Before making a search, the officer conducting it *shall call two or more* respectable inhabitants of the neighbourhood to attend and *witness* the *search*. They cannot, however, be afterwards required to attend Court, unless specially summoned by the Magistrate (sec. 103). The *occupant* of the house or place searched, has a *right to attend* during the search. It is not said in the Code, but it is a rule of practice, that search is made by daylight unless there is an emergent reason otherwise.

[1] If large and heavy logs of timber, for instance, were found, it would, I presume, be sufficient to take steps to secure them, and it would be necessary to *report* the fact and take the magistrate's order.

## LECTURE XII.

### CRIMINAL PROCEDURE (*continued*).

### The Prevention of Offences.

In the last Lecture we dealt with what I may call the machinery of the Criminal administration; we considered the Courts and Magistrates, and their powers: we spoke of the police, and of the part taken by the general public, with regard to their duty to give information and aid, and their power to arrest offenders in certain grave cases. We also spoke of the general subject of the arrest of criminals and how it was effected, and of the processes that could be issued to obtain the appearance of persons and the production of documents and hidden property.

The Code now enters on Part IV., which deals with measures that may be taken to *prevent* offences. But this I can only very briefly notice by saying that the main provisions (Chaps. VIII.—XII.) relate to—

(*a*) Taking security, &c., to *keep* the *peace*.

(*b*) taking security, &c., for *good behaviour*, from *vagrants*[1] and *suspicious characters*.

(*c*) taking security, &c., from "*habitual offenders*."

(*d*) dispersing unlawful assemblies (p. 109), and the use of civil and military force for the purpose (for when an unlawful assembly occurs, it is sure, if not at once broken up, to proceed to acts of violence or even bloodshed, or to the destruction of property).

(*e*) the prevention and removal of *public nuisances* in ordinary and in urgent cases.

(*f*) action to prevent riot and violence owing to feelings exasperated in disputes relating to land and houses (immoveable property).

(*g*) action of the police (intervention, and arrest if necessary)

[1] There is a special Act of 1874 about European vagrants and how they are to be dealt with.

to prevent the commission of offences; or causing injury to property) (sec. 152, and see also sec. 23 of the Police Act V., 1861.[1]

*Information to and Investigation by the Police.*

The use of a classification of offences into graver or lesser—'cognizable' or 'non-cognizable,' "summons" or "warrant" cases,—has been already explained (pp. 153, 154).

In the "Part" we are now considering, we see use made of one of these classes of offences, viz., that which depends on the question whether they are of such a serious character that they are "cognizable" by the Police, which again means that the Police may at once arrest the suspected offender without a warrant, and may proceed at once to investigate the case without any order of a Magistrate.

The Police keep a book at their stations, and at once enter therein any information they get of such an offence; an officer is forthwith sent to the spot to make an enquiry, and if possible, arrest the criminal.

If a person comes to inform or complain about a non-cognizable offence to the police, he is simply referred to take his complaint direct to a Magistrate. In non-cognizable cases, the police can only proceed to investigate on the order of a Magistrate (1st or 2nd class).

I cannot follow the Code through the details of the police investigation (secs. 156—170). I will only mention that if the diary of proceedings (and the getting together the necessary evidence) is not complete in 24 hours, the case must be reported and the prisoner (as I have already stated) be sent to the Magistrate for an order of remand.

When making an investigation, the Police officer may require

[1] Mentioning here the Police Act V. of 1861, I call attention to the circumstance, that the enrolment and constitution of a Police force, and its *general duty* as such, is a separate matter. The Criminal Procedure Code is only concerned with the powers of the Police in respect of the prevention and investigation of crimes, and the execution of processes and orders of Courts. The Police Act provides for the gradation of Police officers—Inspector-General, District Superintendents (and their Assistants), Inspectors, Deputy Inspectors, Serjeants and Constables; it provides for enrolment of the rank and file; it gives certain details as to duty and as to certain service regulations. It also contemplates the organization of the districts into a number of local police charges (popularly, but not officially, called *Thanai*), the establishment of "police stations," and the like.

(by written order) the attendance of any person who is believed to know the circumstances; and such person is bound to attend and answer questions. This extends to the limits of the Police officer's own *and* adjoining "stations" (secs. 160—161). Persons though generally bound to answer, are not bound to reply to such questions as tend to criminate themselves.

The statements made may be taken down[1] but are not signed by the deponent, nor can they be used as evidence in a subsequent trial (sec. 162).

If the accused makes a confession voluntarily, there is a special procedure (sec. 164) for taking him before a Magistrate to have his statement recorded and attested.

When the case is complete, it is sent up to the Magistrate with a 'calendar' or police-charge-sheet (popularly called a "chálán") giving the details of the offence, names, dates, &c.

There are also special provisions (both as to the Police and the Magistrates) for enquiring into cases of suicide, homicide, accidental death, &c. (secs. 174—176).

### *Proceedings in Prosecutions—Trials.*

We now approach the actual trial of criminal cases. But there are still certain matters preliminary to the trial which are first considered—for instance:—

In what district or place is an offence to be tried? An offence is ordinarily[2] enquired into or tried by a Court within the local limits of whose jurisdiction (p. 144) it was committed (sec. 177). Where the offence is such by reason of a thing done *and* a consequence ensuing, the trial may be either in the local jurisdiction where the thing was done *or* where the consequence ensued (sec. 179) (*e.g.*, a murder case, in which the man was wounded

[1] They are put in writing because they are useful as a guide to the police. Though not used as *evidence* afterwards, the notes are often referred to by appellate and other courts, and they sometimes throw light on cases as regards their general history and the probability of genuineness, when there is a fear that the case may have been trumped up.

When a Forest officer, specially empowered, holds a local inquiry (sect. 71, Forest Act) his proceeding is not analogous to that of a Police investigation. He is empowered regularly to take down evidence on oath or affirmation (Act X. of 1873, sec. 4), and then, provided the deposition was taken in presence of the accused, it will be admissible as evidence at a subsequent trial.

[2] That is irrespective of special orders transferring a case from one court to another; such orders are sometimes made for special reasons of convenience (sec. 178 and the whole of Chap. XLIV.).

at one place and died from the wound at another). And similarly, where an act is an offence *by reason of its relation to* some other act (sec. 180), *e.g.*, where property was stolen in one place and 'received' in another; or an abetment occurred in one place and the offence abetted was committed in another. There are also special rules as to the place of trial of offenders belonging to *wandering gangs* of robbers (sec. 181); and for thefts where the property is stolen in one place and taken elsewhere—as is generally the case in cattle thefts (sec. 181). So where it is uncertain in which local area an offence was committed (sec. 182).[1] Again a rule is required, where the offence is committed *during a journey* or voyage (sec. 183), or where there is a *doubt* about the proper place (sec. 185); or where the person is within jurisdiction and his offence was committed beyond it, and the offence cannot be tried in the locality of commission (sec. 186): so also when a European British subject commits an offence in a Native State[2] (secs. 188—190).

The Magistrate is the authority who *commences* all proceedings of trial or judicial enquiry for committal to trial.

The High Courts and Courts of Sessions (except in some special proceedings, with which we are not concerned) do not take the initiative; that is to say, they do not receive cases direct from the Police, or on complaint made to them, or on information coming before them (secs. 193—4). The Magistrate begins the case by making an enquiry, and if he finds that a case is apparently made out, he *commits* (for the actual trial) to the High Court or the Sessions, as the case may require.

The Magistrate will take action only:—

(*a*) On a complaint made to him;

[1] This section does not apply if it is a question of being in British territory, or just outside it; for outside British territory the Court would have no jurisdiction, and then the matter may require nice discussion. In 1880 there was a case of a Forest guard of the Náhan State shooting a British subject close to the border between the Ambála District (Panjáb) and the State. The most elaborate enquiry as to the position of the boundary line, and that of the man when he fired and of the deceased when he fell, had to be made; and it was ultimately found that the offence was actually committed in foreign territory.

[2] This is for special convenience. Ordinary offenders in Native States are, of course, liable to the Courts of the State; but it might be embarrassing to them to deal with European British subjects: hence the special provisions for trying them (on Political Agent's certificate) by Courts in British India.

(*b*) On a police report of the facts (the 'chálán' already spoken of—p. 160);

(*c*) On information received otherwise than by police report, or on his own knowledge or suspicion that an offence has been committed.

Any Magistrate may be empowered by the Local Government (or by the District Magistrate) to act in cases (*a*) and (*b*); but only a Magistrate of first or second class in case (*c*); and in that case, the person accused may require to have the case transferred to another Magistrate (or committed for trial to the Sessions).

It may be that under special rules of law, some cases are not taken up on complaint, as a matter of course. Sec. 195 requires *sanction* of the authorities therein named, before certain prosecutions can be proceeded with; these are chiefly cases of contempt of lawful authority of public servants, and offences against justice (false evidence, and regarding documents given in evidence). So where a *public servant*, of a class not removeable from his office without the sanction of Government, is accused of an offence *as* such public servant, no Court will take cognizance of the charge without the previous sanction of Government, or of some officer to whom the person accused is subordinate and whose power in the matter, Government has not limited (sec. 197).

Another preliminary matter of importance has to be noted. In a large number of cases, the police will have been able to investigate, and so the case will be brought up to the Magistrate ready for trial, with the witnesses, &c. present. But in other cases, the police will not have had cognizance, and so the proceedings are opened by someone presenting a complaint to the Magistrate direct—which may be done either orally or in writing. In that case the Magistrate is bound at once to examine the person on oath or affirmation, and reduce the substance of the examination to writing which is to be signed both by the Magistrate and complainant.

If the complaint is made in writing and the Magistrate sees he is not competent, he will return the petition endorsed that it may be presented to the proper tribunal.

A Magistrate (but not one of the third class), if in doubt, may

postpone issuing a process for the appearance of the accused; and may either himself make a further enquiry or direct a local investigation.

In any case, a Magistrate need not go further if he is satisfied, after examination of the petitioner (or as the result of an enquiry ordered), that there is not sufficient ground for proceeding (sec. 203).

If the Magistrate decides that there is a case, he will commence proceedings (Chap. XVII.) by issuing process to bring the accused up. This process will be a "summons" or a "warrant" according to the nature of the offence (p. 154), and with reference to Schedule II.

But in any warrant case the Magistrate may begin with a mere summons, if he thinks it will be sufficient; and *vice versâ*, sec. 90 authorises a warrant being at once issued instead of a summons in certain cases. As to the necessity for the personal appearance of the accused, it is sufficient to refer to sec. 205.

The preliminary matters being thus disposed of, we will now consider the form of trial before a Magistrate: and this will include the following:—

(*a*) The formal preliminary judicial *enquiry*, ending (if an offence is apparently established) with a 'charge' being drawn up, and an order committing the prisoner for trial to the Sessions or to the High Court (as the case may be).

(*b*) The formal *trial* (of "warrant cases") before a Magistrate. This is otherwise exactly like (*a*) and a formal charge is drawn up, only that the Magistrate himself conducts the whole trial; that is, he also hears the defence and adjudicates,—either convicting and passing sentence, or else acquitting the prisoner.

(*c*) The less formal trial of a "Summons Case."

(*d*) The very simple form of "Summary" trial for petty offences.

All Presidency, District, Sub-divisional and first-class Magistrates possess the power of *enquiry for committal*. Those of the second and third classes require to be authorised by the Local Government.

I do not propose to give the details, but note generally that the proceedings commence by hearing the evidence for the prosecution and examining the accused "*for the purpose of*

*enabling him to explain*" any circumstances appearing in the evidence against him; if then (or even before that) the Magistrate is satisfied there is no case, he "discharges" the accused.[1] If there is an apparent case, a formal "charge" sheet is prepared (of this hereafter): it is read to the accused and he is entitled to a copy free of cost (sec. 210). The accused may then name the witnesses he wishes to produce on his trial (for detail see secs. 211, 213, and 216). The order of commitment for trial (with the reason and an outline of the case) is then recorded. An order of commitment once made (by a competent Magistrate) cannot be quashed except by the High Court, and then only on a point of law. The proceedings, with the formal "charge," and any weapons or other "exhibits" in the case, are sent to the High Court or Sessions Court as the case may be. The prisoner is kept in custody unless the case is one in which under the Code he can be admitted to bail.

### *The Charge.*

The "Charge" being an important document, is separately described in Chap. XIX., which can be read and calls for no detailed comment. It will be well however to remark that the object of the provisions regarding the "charge," is not to require technical accuracy, or to make justice dependent on niceties of wording, but to ensure that the prisoner should be able to know clearly what (in substance and practically) he has to answer for, and defend himself against, if he can. The charge is filled in on a regular printed form; and besides giving particulars as to names, places and dates, it is to specify the offence and the section of the I. P. Code, or other law, under which the prisoner is charged. No formal error in the charge will have any effect, unless it has misled the accused. The Court trying the prisoner finally, can alter, amend, or add to, the charge at any time before the verdict of the jury, or the opinion of the assessors, is given (sec. 227). Where a charge is

[1] It must be remembered that the terms "discharge" and "acquit" have definite meanings, and cannot be interchanged or used at random "Discharged" applies only where the prosecution evidence is so weak that the Magistrate does not think it necessary to frame a charge or send the prisoner up for trial or call on him for a defence, as the case may be. Any order in favour of the prisoner after the charge and the defence heard, is an "acquittal."

altered, secs. 228—231 must be attended to; and where a wrong or deficient charge has *misled* the accused, a new trial may be ordered (sec. 232).

Under this head, too, has to be considered the important question as to when a "joinder" of several charges in one trial is permissible, and when separate trials should be held. Here, also, sec. 235 is an important supplement to sec. 71 I. P. Code (see p. 141). And the illustrations make clear what is meant

I will only mention that sec. 235 deals with three cases:—

1. Where the person is charged with a *series of acts* so connected as to form a single transaction, and yet each of the acts constitutes a separate offence; the charge may specify all such offences. In this case the acts may or may not be combined in such a manner as to come within sec. 71 I. P. C. If they are, the charge would probably be so worded as to represent one single "count" or head. As an example of the first, I may mention the case of wounding with several stabs of a knife—here one offence (of a very grave character) would be charged, but the details would be specified. An example of a case where 71 I. P. C. would *not* be applicable (and where separate punishments might be given for each count in the charge) would be of A. rescuing B. from lawful custody of a policeman, and causing grievous hurt to the policeman in so doing; or A. breaking into B.'s house and proceeding to abduct, or to commit adultery with, B.'s wife.
2. Where an act is committed which *falls within two or more separate definitions* of an offence against any law, all such offences may be put in the charge. Thus an act which is an offence both against the Forest law and the I. P. Code, may be charged in separate Counts under each, in the same charge. (There could be only one conviction and sentence, p. 95.)
3. Where several acts, of which one or more by itself (or themselves) is an offence, *constitute when combined, a different offence*, the charge may include both the separate offences and the combined offence. Example A. robs B. and so doing causes hurt to him: the act of robbery is an offence under sec. 392 I. P. Code; the hurt, by itself, comes under sec. 323; but the combined acts constitute the offence of "robbery with hurt" (sec. 394 I. P. C.). All these offences may be charged and tried at once.

It will be recollected that these are procedure sections as to

the mode of framing charges and holding trials, they do not interfere with the substantive law, as to whether accused is liable or not to a *separate penalty* for each element in the charge.

In cases of doubt there may be "alternative" charges (sec. 236).

It will occasionally be found that, in the course of evidence, the *legal nature* of the offence turns out to be different from that charged; this will not entitle the prisoner to be acquitted. Thus on a charge of theft, the facts may be substantiated, and yet it may show that the case was really one of "criminal misappropriation" or a "breach of trust;" the prisoner may be convicted of either, though "theft" alone was specified in the charge. And so, in general, if a person is charged with a major offence, and some of the requisite details are not proved, but those that are proved still constitute a minor offence, he may be convicted of the latter (sec. 238).

Sec. 239 explains where several persons, all concerned in one offence, or guilty of different offences in the *same transaction*, may be tried jointly.

In conclusion I will only mention that where an accused person has been previously convicted of an offence, and it is intended to bring this out at the trial, the fact, date and place of the previous conviction should be stated to the Magistrate (sec. 221).

The Code next goes to "Summons cases," but for convenience I will take first (Chap. XVI.) the regular trial before a Magistrate of "warrant cases." Practically the procedure is the same as that just described, only that on the charge being drawn up, instead of making an order of commitment to a higher court, the Magistrate proceeds with the trial himself. On the prosecution evidence being completed and the charge drawn up, the Magistrate reads out the charge and asks the prisoner to plead guilty or not guilty. If the prisoner says nothing or pleads not guilty, he is called on for his defence; and he may recall any of the prosecution witnesses, and cross-examine them anew. If he wants any other witnesses, the Magistrate is bound to issue process for them, except as provided in section 257.

If the prisoner is found guilty, he is "convicted" and

"sentenced;" if not, he is acquitted—not discharged; that term means set free because no case appears, *i.e.*, no charge is framed. All the provisions about the "charge" and other matters above noted, apply equally here.

In "Summons cases" (p. 154) the accused is ordinarily brought up on a summons, and no formal charge is required. On commencing the trial, the particulars of the offence complained of are merely stated, and the accused is asked if he has any cause to show why he should not be convicted. If he admits the case and shows no cause, he must be convicted accordingly (sec. 243). If not, the Magistrate proceeds to hear the complainant and his evidence, and also all the evidence which the accused produces.

The Magistrate *may* postpone the case in order to summon witnesses (not produced by the parties on either side).

Here again the final order is either "acquitted" or "found guilty." The Magistrate may convict according to the proof, whatever the complaint may have been, provided the offence proved is of the nature of a "summons" offence (*i.e.*, triable under this chapter).

As to what happens if the *complainant does not appear*, or wishes to *withdraw* the complaint, secs. 247—8 are explicit.

In a "summary trial" there are some points to be noticed.

1. The procedure is allowable in the class of petty cases specified in sec. 260,[1] whether those cases are, in their nature, of the "summons" class or of the "warrant" class.
2. A summary trial can only be held by a District Magistrate or by a first-class Magistrate specially empowered, or by certain benches of Magistrates.
3. No sentence of imprisonment exceeding three months can be passed (*i.e.*, substantive sentence; where a further term is added merely as an alternative in default of payment of fine, that may be additional).
4. In cases where there is *no appeal*—and there is none as we shall afterwards see (sec. 414) if the sentence is of three months' imprisonment only or fine only (not exceeding 200 rupees), or whipping only; there may be an appeal if there

[1] These include offences under the Forest Act if punishable with imprisonment not exceeding six months.

is any combination—*no formal charge* need be prepared and no evidence *recorded;* but entries are made in a book or tabular form, with columns showing briefly the particulars of the offence and the result and sentence, as given in sec. 263.

5. In cases where there *is an appeal*, the Magistrate (or bench) must record a "judgment embodying the substance of the evidence" and the particulars just mentioned (sec. 263); and this is the only record.

These provisions for summary trial, it will be observed, refer directly to the *form of record*, and greatly reduce the labour of writing down evidence, &c., at the trial; but as regards the actual *form of procedure*, the course of a 'warrant case' or a 'summons case' will be followed according as the case belongs, in its nature, to one or the other class; *e.g.*, in a petty theft (which in its nature is a warrant case), the prosecution evidence would be heard first, then the accused would be charged (orally, for no written charge-sheet is necessary), and then his defence would be taken. If, on the other hand, it were a petty case of "criminal force" (summons case), the complaint would be stated and the accused at once asked if he had any plea to make; and only if he denied the complaint, would evidence be taken.

It will be observed that I have said nothing about the actual trial (after commitment) in a High Court or Sessions Court.[1] I do not think it necessary. The trial is (or ought to be) always conducted by a Public Prosecutor or some duly appointed person; and there are special rules regarding juries (in cases tried by jury) and assessors in other cases. For all these details, Chap. XXIII. can be consulted.[2]

[1] All trials before the High Court are by jury of not less than nine. Those before the Sessions are with assessors (two or more), unless the Local Government (sec. 269) has issued a notification directing *all* (or *certain classes* of) offences to be tried with a jury, then the number of jurors may be fixed at not less than three or more than nine, according to the locality and the possibility of getting qualified jurors (*cfr.* p. 144, note).

*Assessors* do not give a verdict on the facts which is conclusive, they only state their opinion (sometimes a very intelligent and useful one), but the judge is not bound to concur, or follow it

[2] This chapter contains all about juries, and the liability of persons to serve as jurors Forest officers are not excused from serving (sec 320), unless exempted by the Local Government (in class K).

*General Incidents of Trials and Enquiry.*

We have not yet done with the question of procedure at trials, for there are several matters likely to come to notice in the course of trials, which require provision, and will be obvious directly they are stated. Then, too, nothing has yet been said about making a record of what is given in evidence; and information is also required about the form and contents of a criminal judgment; lastly, there is the execution of sentences (as well as cases of pardon or commutation of sentence); and the effect of acquittal or conviction; these matters call for a few remarks in completing our notice of Part VI. of the Code.

Concerning the incidental matters which constantly arise in connection with trials, Chap. XXIV. contains several rather important provisions. I can only just allude to them:—

(*a*) In certain grave cases it is advisable to get what is popularly called "Queen's evidence" by offering a pardon to some one more or less concerned in the offence, on condition of his making a full and true disclosure (sec. 337).

(*b*) Settling the right of accused persons to be defended by an advocate or pleader (sec. 340):

(*c*) What is to be done in the case of an accused person who, though not insane, cannot be made to understand the proceedings (sec. 341).

(*d*) The liability of an accused person to be examined: This obviously reasonable improvement has not yet been introduced into English law. I need only say that the examination (which is recorded in full (sec. 364) with all the questions put included) is voluntary, and not on oath or affirmation: but the Court or jury may draw any inference it thinks just, from a refusal to answer, or from obviously false answers: the examination is required (not as in France, to incriminate, but) solely for the purpose of enabling the accused to explain any circumstance appearing in the evidence against him (sec. 342).

(*e*) The general question of adjourning or postponing trials is dealt with in sec. 344.

(*f*) A series of provisions next deals with cases where the prosecutor or complainant wishes not to go on with a trial,

or (for some reason or other) wishes to condone the offence, on receiving satisfaction or otherwise. It is always possible in the lesser class of offences in which a complaint has been made, to withdraw it with the leave of the Magistrate (sec. 248); but in regular (warrant) cases of a grave character, the prosecution must go on, unless indeed the prosecutor desires otherwise *and* the offence is declared to be compoundable (which is settled by sec. 345).

(*g*) It sometimes happens that while a trial is going on, the evidence discloses such a bad case, or such a view of the nature of the offence, that the case ought to go before the Court of Sessions; secs. 346, 47, 48 provide for such cases.

(*h*) An analogous case is where a Magistrate is rightly trying the case, only it appears to him that the accused should get a larger punishment than his own class powers enable him to award; sec. 349 tells him what to do (p. 149).

The remaining matters in the chapter call for no special remark.

*The Record of Evidence.*

Those who are likely to be invested with powers which may entail the duty of recording evidence, will naturally study the whole Chap. XXV. All I need do now is to point out the general features of the scheme.

Observe that this chapter has nothing to do with the branch of adjective law called the Law of evidence. It does not determine what facts must be proved and what not; or what is admissible in evidence and what is not. This branch of law has been wholly excluded from our study. What we are here concerned with is the preservation, in writing, of the evidence obtained at trials, in a varying degree of fulness which is practically sufficient with reference to the importance of the case, and to its being appealable or not.

There are two main forms of record. One consists in the presiding Magistrate *himself* making a memorandum of the *substance* of the statement of each witness as the examination proceeds; this memo. is signed by the magistrate and kept on the record. This is sufficient in all "summons cases."[1] (In

[1] In any summons case (sec. 358) the Magistrate *may* take down the whole evidence. Sometimes it is important or very useful to do so.

cases tried summarily (p. 167) even this much is not needed; the Magistrate makes no written note at all; but if the case is appealable, he embodies a note of the substance of the evidence in his judgment.)

In warrant cases and enquiries previous to commitment, (which represent the full or formal procedure before the Magistrate) and in Sessions Cases, the evidence is recorded *in full*, (sec. 356) in the language of the Court, but in a narrative form and not in form of question and answer: (unless the presiding officer directs a particular question and answer to be noted). It is optional for the presiding officer to make this record with his own hand or not; unless (sec. 357) the Government has given directions on the subject. If the officer does not take the whole evidence down himself, he will make, in his own handwriting (and his own language), a memo. of the substance of the evidence as it proceeds, while his clerk records the depositions in full.

There are other details as to evidence given in the English language; as to reading over the deposition to the witness and so forth. One sec. (364) requires a special form of record for the examination of the accused person (p. 169), and this has to be carefully attended to.[1]

### *The Judgment.*

As to the form and contents of a criminal judgment, it is sufficient to refer to Chap. XXVI., which should be read generally. The judgment of the Magistrate or other Court is to be delivered in open Court (sec. 366), and is to contain the points for determination and the decision thereon, as well as the reasons: it is to be dated and signed in Court when pronounced.[2] The chapter further gives directions as to the sentence, and as to certain other particulars.

Chap. XXVII. then deals with some special cases in which the Court's *sentence requires confirmation: e.g.* every sentence of death; and certain others, *e.g.* District Magistrates with special powers (p. 147) when the sentence is of a certain magnitude.

[1] When a Forest-officer has power to record evidence on the spot (before trial) as his record will be afterwards admissible at the trial, it is desirable that he should have the whole written down (in narrative form) by his clerk in the vernacular, and he should himself make a memo. in English of the substance as the deposition goes on. If an accused makes an important statement in the course of the enquiry, he should be brought before a Magistrate as sec. 164 provides.

[2] Judgments are written in English or in the language of the Court. If in English, a translation (sec. 372) is to be made when the accused requires it.

## LECTURE XIII.

### CRIMINAL PROCEDURE (*concluded*).

### The Execution of Sentences.

WHEN the judgment has been pronounced and a sentence awarded, the Criminal Procedure Law has further to direct how sentences are to be carried out, and how it is officially known and certified that the punishment has been inflicted.

It is hardly necessary to remind you that while certain sections of the Indian Penal Code (already considered, p. 131 *ff*) prescribe the nature and extent of punishments in general, as a question of substantive law, we have still to look to the Procedure Law to tell us how, and with what precautions, the sentence is, in each case, to be carried into effect.

Sections 381—383 deal with sentences of death and transportation, and provide what is to be done when a woman under sentence of death, is found to be pregnant.

Sentence of *imprisonment* is carried out under a special warrant, signed and sealed by the Judge or Magistrate (sec. 383). This warrant is returned by the Jailor when the time is up (or if otherwise the prisoner is released on due authority), and with an endorsement, under his signature, showing the manner in which the sentence has been executed.

*Fines* are levied as directed in sec. 386. The Court may issue a warrant for levy by distress and sale of any *moveable* property belonging to the offender: and this is done in all cases whether there has been a sentence of further imprisonment in default of payment or not, since the fine has to be recovered, if possible, in any case. But, of course, as soon as the fine is paid, the prisoner, if in jail only in default of payment, is let go; and if a part of the fine is paid, a corresponding part of the term is also remitted (I. P. Code, sec. 69). This is a matter of substantive law, being part of the nature and conditions of the punishment of fine; so also it should be remarked that

the time within which a fine remains leviable, and the liability of heirs to pay the fine, are matters of *substantive* law (I. P. Code, sec. 70). Fines when recovered, can always, under sec. 545 (C. Pro. Code) be devoted to (1) compensate deserving persons for expenses properly incurred in prosecuting the offender; (2) in compensation for the offence.

Under the Forest Act, special power is given, under sec. 75, to the Local Government, to make rules for the payment of fine proceeds, in *reward to informers*, which, it will be observed, is not contemplated by the Procedure Code.

It will be sufficient here to refer to sec. 388 as giving a power (in case of a sentence of fine *only*) to release the prisoner on bail, instead of at once carrying out the order of alternative imprisonment, and thus giving him a better chance of making arrangements to pay the fine.

While Act VI. of 1864 declares the substantive law of *whipping* as a penalty, the secs. 390—395, C. Pro. Code, add a number of procedure rules as to time, place, mode of administering the whipping, and enact certain precautions against the misuse of the penalty.

There are certain provisions regarding Reformatories for juvenile offenders (sec. 399 and Act V. of 1876) which I must pass over with this mention only.

From the provisions about punishment, the Code naturally passes to sec. 401, which gives a power of *pardon* or commutation of sentence, to the Governor-General in Council and to the Local Government.

In this connection also it is convenient to state the general principle (sec. 403) that a person once acquitted or convicted, cannot again be tried for the *same* offence; *nor on the same facts*, for any *other offence* for which a *different* charge might have been made under sec. 236, or where a conviction might have followed under sec. 237. But a person may be tried again for a *distinct* offence, which he committed in the course of a transaction which comes under sec. 235, par. 1 (*e.g.*, a person is charged with murder and is acquitted: no charge of robbery was made at the trial; but it appears that when the murder was committed, the offender also committed robbery; there is nothing to prevent his being again tried for the robbery).

And so supposing certain *consequences* happen after the trial, and those consequences *alter* the nature of the offence committed: (*e.g.*, a person is convicted of 'causing grievous hurt;' and after the trial, the sufferer dies of the hurt, so that the act becomes culpable homicide or murder according to circumstances: he may be tried again).

Or when the renewed charge is of an offence which the Court which first tried the person had no jurisdiction to try, *e.g.*, A. B. C. D. and E. are tried and convicted by a Magistrate first class, of robbing X. They may afterwards be brought up on the same facts, before the Sessions, for the offence of 'Dacoity' (p. 119) which the Magistrate had no jurisdiction to deal with.

### Appeal and Revision.

The criminal cases in which appeals are allowed are less numerous than those which occur under the Civil Pro. Code; nevertheless there is sufficient provision for the rectification of any real errors. The brief examination of the Code which we have made up to this point, will show that a number of *orders* are passed by Magistrates other than *decisions* of 'guilty' or 'not guilty' on actual trials; in fact a distinction can be drawn in general between the "orders" or the "judgments" of a Criminal Court or Magistrate.

No appeal lies from any such *orders;* and an appeal lies from any *judgment* only when *expressly* provided by the Code, or by some special provision in any other law.[1]

Speaking generally, there is one appeal from a *conviction* by a Magistrate, or by the Sessions Court:—but not, if the accused has pleaded guilty (unless it is a question of the extent or legality of the sentence). And, further, there is *no appeal* (sec. 413)—

(1) from any Court of Session, District Magistrate, or Magistrate of first-class, when the

sentence does not exceed { one month's imprisonment only; fine up to 50 Rupees only; whipping only.

[1] *E.g* (as Dr W. Stokes remarks), no appeal is possible, under sec 123, from an order by a District Magistrate, directing a person to be detained in prison until he should find security for his good behaviour, nor under sec. 22 of the Cattle Trespass Act (I. of 1871).

(Imprisonment ordered as an alternative, in default of payment of fine, does not give an appeal.)

(2) in summary cases (sec. 414) by a Magistrate empowered under sec. 260, when the sentence

does not exceed { three months' imprisonment only; fine not exceeding 200 Rupees only; whipping only.[1]

(3) Ordinarily there is no appeal from an *acquittal:* but (sec. 417) the Local Government may specially order the Public Prosecutor to present such an appeal from the judgment of any Court except a High Court.

Appeals when admissible, are both as to the *law* and the *facts:* except where the trial is by jury, when the appeal is on law only (sec. 418).

As to the *Appellate Courts;* judgments of Magistrates of the second and third class (or a bench of such Magistrates) are appealable to the District Magistrate (sec. 407)—with certain proviso as to a first-class Magistrate being specially empowered to hear appeals).

From an Assistant Sessions Judge, a District Magistrate, or a first-class Magistrate, the appeal is to the Sessions Court—but with certain *provisos* (sec. 408). N.B. *Assistant* Sessions Judges do not take part in the appellate work of the Sessions Court (*Joint* or *Additional* Sessions Judges do).

From convictions by the Sessions Court (other than by an Assistant Sessions Judge) the appeal is to High Court (sec. 410).

These are the *general* provisions of the Code on this subject.

If the appeal is from an *acquittal:*—

the Court may order

(*a*) further enquiry,

(*b*) or that the accused be retried or committed for trial, as the case may be.

(*c*) or may find the person guilty and pass sentence.

If the appeal is from a *conviction:*—

the Court may reverse the conviction and order,—

(*a*) an acquittal or discharge.

[1] In both these cases if the person accused is a European British subject, the secs. 413, 414 do not apply. And in any case, any *combination* of sentences gives an appeal.

(*b*) a retrial or committal.

(*c*) may alter the finding and maintain the sentence.

(*d*) may reduce the sentence with or without alteration of the finding.

(*e*) may alter nature of sentence but not enhance it (with or without alteration of the finding).

The verdict of a jury can only be set aside on the ground that the verdict is erroneous owing to the misdirection of the jury by the judge, or to the jury misunderstanding the law as laid down by the judge.

There are further details about suspending the sentence and taking bail during appeal, and about taking further evidence, which I do not go into.

*Revision.*

As the power of appeal is limited, it is desirable that there should be certain other provisions for correcting errors and seeing that justice is done.

We may pass over the power which Presidency Magistrates have of making a "reference" to the High Court for a ruling on a doubtful point of law, and call attention to the important sections 435—439 on the subject of "Revision." That means, that certain authorities can, either on request of any interested person, or from their own knowledge, *e.g.*, from noting the case in the statistical returns and abstracts of work (which are submitted by the subordinate courts to the superior), call for any record and see if a proper *order* or *judgment* has been passed, and if not, then take certain measures as provided.

The High Court, the Court of Sessions and the Magistrate of the District[1] are empowered (by sec. 435) to satisfy themselves as to the "correctness, legality or propriety" of any "finding, sentence or order" within their local jurisdiction.

The Court of Session and the District Magistrate are restricted to the action provided in secs. 436, 437 respectively, the High Courts have the more extended powers in sec. 439: so that if the former authorities, on getting up the record of a case, think

[1] And a subdivisional magistrate, with certain limitations, sec. 435 (2nd clause).

that some alteration is needed beyond what they can themselves order under secs. 436, 437, they will forward the case with a report, and the High Court may then act under sec. 439.

The powers under sec. 436 refer only to cases triable exclusively by the Court of Session, where there has been no committal, but a discharge which the revising authority considers improper. The offender may be rearrested and committed for trial on the evidence already taken; or if necessary (because some other offence seems likely to be established) a new enquiry may be directed: when a committal is ordered, the accused must be heard as to any objection he may be able to offer. Under sec. 437, the High Court, or the Court of Session, is also empowered to take notice of *any* case of improper discharge, or of an improper dismissal of complaint (under sec. 203).

Sec. 439 states the further powers of the High Court, which, as already remarked, are exercised of its "own motion"[1] or on the report of the Session Court or District Magistrate (sec. 438). These extend to doing anything that could be done on appeal, and even to *enhancing* a sentence that is improperly lenient. It is only necessary to remark on this provision, that a failure to pass an adequate sentence is just as much a failure of justice, as far as the public security is concerned, as an improper discharge, or an improper conviction. In every case of enhancement, however, the accused *has a right* to be heard: and when the High Court enhances a sentence, it does so within the *limits* of the *powers* of the *original court;* in other words, it only passes such a sentence as the original court might (and ought to) have passed.

It might be asked, if there is this wide power of correcting errors by revision, why is any appeal allowed at all? Because in an appeal, the accused has always a right to be heard by his advocate, pleader, &c., and can raise any plea he likes; whereas in revision (sec. 400) no one has a *right* to be heard, unless it is a case of enhancing the punishment. As a matter of fact, however, if a prisoner sends an agent and asks leave to address the

[1] When the Court acts "on its own motion" that means that either it has noticed the case in one of the returns of work (with lists of cases) sent up to it periodically by the subordinate Courts, or that some one has by petition, called its attention to a case and induced it to call for the record.

Court, he always is heard: but still there is not the same latitude as there is in appeal.

### *Of certain Special Proceedings.*

The matters dealt with under part VIII. of the Code might have been included under the head of trials, but would have lengthened and confused the chapter. This "Part" relates to the Trial of European British subjects, who have always possessed certain privileges, chiefly with a view to render their liability to Criminal Courts as like what it would be at home as possible. A controversy arose about these privileges in 1884; and this resulted in certain modifications of the Procedure law, *the general feature* of which (as it now stands) is, that a European British subject has lost the privilege of being *exclusively* triable by a Court presided over by a European British subject (and Justice of the Peace), but still can only be dealt with by a Native Judge who holds a certain (superior) rank and dignity, and is therefore *ex officio* a Justice of the Peace. And the trial is also limited and conditioned in other ways, so as not to deprive the accused (practically) of certain rights which he would have in his own country.

To state the matter more in detail, every European British subject is liable to be tried (or committed for trial as the case may be) by the Courts of—

The Presidency Magistrate.

The District Magistrate.

The Sessions Judge himself,[1]—

whatever nationality the Judge or Magistrate is of.[2]

But even then the accused has certain privileges:

(1) The District Magistrate cannot act under his special powers (secs. 30, 34) in provinces where such powers are conferred.

(2) The Presidency Magistrate and District Magistrate respectively can only pass sentence up to the limits stated in sec. 446.

(3) If he is charged with an offence which will not be adequately met by such sentence, he must be committed to the Sessions Court (or in the Presidency towns to the High Court). And if the offence is punishable with death or transportation for life, always to the High Court. And even when triable by the

[1] A Joint or *Additional* Sessions Judge or an *Assistant* Sessions Judge cannot try a European British subject unless he is himself a European British subject, and in the case of an Assistant Sessions Judge also, unless he has held office for three years, and has been specially empowered (sec 444).

[2] These officers are *ex officio* Justices of the Peace (p. 145).

Sessions Court, the Judge can only give him a sentence of imprisonment up to one year, or fine (unlimited) or both; if therefore the case is graver than such a sentence is adequate for, the trial must be transferred to the High Court (sec. 449).

(4) In trials before the Sessions or the High Court there are certain privileges of having a mixed jury (sec. 451) (*i.e.* at least part being Europeans or Americans).

(5) In trials before a District Magistrate (either in a summons or a warrant case) the accused may require (by applying before a certain stage in the proceedings) to be tried by a mixed jury: and the details may be learned by reference to secs. 451A., 451B.

With regard to *other* Magistrates, *any* Magistrate who can take cognizance of cases on complaint, may do so in case a European British subject is charged or complained against, but he must make the process he issues (for appearance) returnable before a Magistrate having jurisdiction to hear the case (*i.e.* one who is able to try a European British subject).

No Magistrate, not being a Presidency or District Magistrate, can try (or hold an enquiry for committal) in the case of a European British subject, unless he is himself both a European British subject, a Magistrate of the first class, and a Justice of the Peace. And then he cannot pass a sentence above three months' imprisonment or 1,000 rupees fine or both (sec. 446, cl. 1) (so that if there is a grave charge, he must commit to the Sessions or the High Court as the case may be).

The chapter concludes with details regarding the mode of pleading the privilege as European British subject; and the decision on the merits as to whether the accused person has such a privilege; the waiver and non-pleading of the privilege; the application of a European British subject alleging unlawful detention; and rules about mixed juries.

Another instance of special proceeding is, when an accused person appears to be *insane*. I can only refer to Chapter XXXIV. on the subject.

It has already been mentioned (p. 162) that a *sanction* is required under sec. 195, before certain complaints, &c., will be entertained; and among these are cases of false evidence and other matters affecting cases in Court. Chapter XXXV. speaks of similar cases where the Court itself thinks right to take action, because the offence is committed before it, or is brought to its notice in the course of its judicial proceedings.

And sec. 480 deals with cases of contempt of Court (here there is no privilege of European British subject).

This part concludes with a chapter on maintenance of wives and children, which except that they are heard by *Magistrates*, are really not criminal matters at all, and would have been better dealt with in a separate Act.

*Supplementary Provisions—Public Prosecutor, &c.*

The Code concludes with several chapters containing details on matters which might have been placed along with other provisions, but which would have swelled the earlier chapters and rendered reference more difficult. Here then we find directions for the appointment (either for local areas, or classes of cases) of a Public Prosecutor. This officer has a right to appear in all Criminal Courts; and if any private person appoints a pleader, &c., in his own interest, this pleader will act under the directions of the Public Prosecutor.

Sec. 495 is important as settling who may conduct a prosecution when no Public Prosecutor is acting. Forest officers may be empowered under this section to conduct official prosecutions.

In this part too will be found the details about *bail* already spoken of (secs. 496–501) and about *bonds* entered into as security for appearance, or other purposes (secs. 513–516). Among them only I note sec. 513, which enables a person (with permission) to deposit a sum of money in Government securities in lieu of a bond with sureties.

The sections dealing with "commissions" to examine absent witnesses, and certain details about a Chemical Examiner's formal report being admitted in evidence, need no remark.

Chapter XLIII. relates to the cases where orders about property are required, *e.g.*, property regarding which an offence has been committed. Sec. 519 is the only one calling for notice; it allows of the disposal of money found on a person convicted of theft or of receiving stolen property, by paying it (or so much of it as may be required) to an *innocent* person who bought stolen property not knowing its character, and who has had to restore it to its owner, and so would otherwise lose his purchase money.

Chapter XLIV. collects together the orders about the transfer of cases from one Court to another, under certain circumstances.

### *Effect of Irregularity in Procedure.*

Of the remaining chapters, that relating to the *effect of irregularity* (Chapter XLV.) is worthy of notice. Sec. 529 provides that certain acts of Magistrates, if done in good faith, are not to be set aside merely because the Magistrate was not technically empowered. But if he does the things enumerated in sec. 530 without authority, his acts are void.

Sec. 531 next provides that no finding, order, or sentence of any Criminal Court can be set aside merely because the proceeding was held in the *wrong local area*, unless the error occasioned a failure of justice.

And with reference to *confessions of accused* or other *statements* which require certain forms of record under sec. 364 or 164; the confession, &c., is not rendered invalid for want of form (the provisions of the section not being fully complied with) but evidence must be taken that the statement was duly made: and the statement will then be admissible, unless indeed the error has "injured the accused as to his defence on the merits" (sec. 533).

After some other details (which I pass over) as to errors by omission to frame a formal charge, as to trying by jury instead of with assessors, or *vice versâ;* sec. 537 gives the important provision, that no sentence, order, or finding can be altered or reversed, either on *appeal* or *revision*—

(1) On account of error or irregularity in the various acts and stages of the trial or enquiry;
(2) Any want of formal sanction under sec. 195;
(3) Any defect of revision of list of jurors or assessors;
(4) Misdirection to a jury;

*unless* a failure of justice has been occasioned thereby.

### *Miscellaneous Provisions.*

Of the further provisions (Chapter XLVI. Miscellaneous) I shall only call attention to sec. 545, which allows of the *fine* being awarded, wholly or in part, in defraying costs of prosecution, or in compensation for the injury done; and if any civil suit for damages is subsequently filed, the Court will take into

account any sum which has been paid or recovered as compensation under this section.

Sec. 555 gives the usual rule that no magistrate, judge, &c., can try or commit any case (except with permission of the Appellate Court) in which he is personally interested.

The Local Government determines what is the "language of the Court" (sec. 556).

Lastly, ten sections have been added by Act IV. of 1891 (sec. 2) which are out of place; one (sec. 561) does not concern us, but sec. 560 replaces sec. 250, which is repealed and belongs to the chapter on Summons cases, and also to those on warrant cases. If on a Magistrate's trial, the accused is discharged or acquitted (of any offence) and the Magistrate is satisfied that the accusation against him was frivolous or vexatious, he may order the person on whose complaint or information the accusation was made, to pay compensation up to fifty rupees, or to suffer simple imprisonment not exceeding thirty days. The compensation is recoverable as a fine. There are certain "provisos" as to appeal and otherwise, which need not be here referred to.

END OF PART II.

# PART III.

## THE FOREST-LAW (BASED CHIEFLY ON THE INDIAN ACTS).

## LECTURE XIV.

### GENERAL OBSERVATIONS ON FOREST LAW.

#### 1. Why is there a Special Law for Forests?

WE have now completed our notice of the *general principles* of law (civil and criminal). I have briefly set before you what may be called a general framework, into which the different departments of law fit. We have confined our attention, however, chiefly to the subject of rights of *persons* arising out of dealings with other persons, or in consequence of some wrong done; and we have described the rights of persons (whether individuals, joint owners, or corporations) over *things*. We went into some detail about the right of *property*, and discussed the legal meaning of the term *possession*, a subject which it was necessary to understand as it always enters into every discussion about ownership or other rights over 'things.' We also examined the important question of how the enjoyment of ownership may be restricted—especially by the fact that certain persons (holders of rights or easements) are entitled, though not as, in any sense, part-owners of the estate itself, to the enjoyment of certain conveniences, or to take certain products of the estate, which otherwise would be enjoyed or taken by the owner. These rights constitute a kind of burden on the owner to which he has to submit. We have seen that these rights are always limited, and that in two ways: they can only exist within certain bounds, by their nature as it is admitted in law; they are also *limited* by the right which the servient estate-holder has not to be hindered further than need be, in the enjoyment of his property by their exercise. The detail of these latter propositions, however, we have still to consider.

We now proceed directly to the FOREST LAW as a special branch of "Public" law. We pass, in fact, from the realm of "general" law to that of "particular" law.

It will naturally be asked at the outset, why should there be a special law for the preservation of Forest properties? Why not protect them, like any other property, by the ordinary law of the land, against mischief by fire or otherwise, against theft, trespass, and other offences, by the Criminal law, or by the Civil law of damages for injury to property? In reply we might confine ourselves to observing that the practical experience of all civilized countries in which Forest Estates have been for ages an important feature, has united in proving that a special law is necessary. And in fact special Forest laws—real Forest laws and not merely barbarous codes for the protection of the King's and the *seigneur's* game—have existed in parts of Europe for some centuries past.[1] But it is well to give more direct reasons. In the first place it is easy to understand that not only the *forest*, but the *produce* of the forest, especially timber while in transit, needs protection on account of its special character, and its special liability to injury—a liability which does not exist in other cases. A forest is really as much the subject of property as an orchard or a garden; but owing to its *natural* origin, in most cases, the ignorant population has an inveterate tendency to regard it as "no man's goods," or as free to all: and the feeling is, that it is theft to steal a gold ring from a shop, or even apples from an orchard or roses from a garden, but it is no harm to cut a tree, or turn in some cows to graze in a forest. A number of offences are thus committed in forests, which in the aggregate, or if allowed to become common, would be very serious hindrances to orderly forest working and successful conservation.

Yet these offences are often, in their individual extent, and as regards the criminal intention of the delinquents, petty; it is therefore desirable to have them specially punishable by mild and suitable means, and by a summary and easily applied procedure. They need also to be directly and simply declared by law,

[1] I believe that the oak forests in the Venetian States were demarcated and formally preserved as State properties, from the 14th century. Forest law has existed in the Canton de Vaud (Switzerland) for more than three centuries.

without requiring to apply, by elaborate legal reasoning, the penal definitions found in laws *primarily* directed to other objects. Again, forests are particularly liable to suffer enormously from a very small act: the careless use of fire, be it a camp fire or a tobacco pipe, may cause the destruction of hundreds of acres of timber, worth, in the capital, thousands of pounds. The trespass of a few cows (and in warm climates buffalos and camels are much worse) may destroy the hopes of several acres of seedling beds or young plantation: the nibbling of goats may destroy the growth (by removing the leading shoots) of young conifers, which if let alone would have grown into valuable trees. Even the careless cutting of sticks may destroy the leaders of young saplings in places where every tree is of importance; and mere trespasses, which would be no harm at all in a field or park, may do considerable damage in a forest where reproduction is going on. The Forester's practical experience will suggest many other examples of the peculiar risks that forests are liable to, beyond and unlike anything experienced in the case of other properties. It is therefore often necessary to prevent strictly, in a forest, acts that elsewhere would be of little or no account. Then again with large natural forests, though every liberality should be shown in the use of partial fencing along particularly exposed places, it is impossible to enclose and fence whole miles of boundary line, as can be done in the case of smaller properties. But a very prominent peculiarity of Forest Property is that in so many cases it is burdened by the rights (of persons other than the owner) to graze, cut wood, or enjoy some other easement. This necessitates provisions for the ascertainment, record, and proper control, of such rights, in the interest both of the right-holder and the servient owner. But more than that; the existence of such rights (which rarely affect other properties) exposes the forest to exceptional risks, and also make it more than usually equitable to lay on such persons, not only the liability to penalty for any misfeasance, but also the special duty of rendering assistance in case of fire or other serious accident.

It is obvious also, that the forests need a special class of Officers for their management, working and protection; and it is necessary to place these Officers under a definite régime,

to give them definite legal powers and duties; (which are distinct from those required by ordinary Police or Revenue officers).

Then too, forest produce in transit, needs special protection. As the Germans say, these products are "*angreifbare waare*" —goods that it is especially easy (or tempting) to lay evil hands on. Timber in a river, seems fair game for peasants to steal, saw up, chip away and hide in the river sand; or for rival contractors to cheat, by erasing other marks and putting on their own. Endless disputes arise between rival owners of timber; and the timber trade needs, and (as experience has shown) eagerly welcomes and gladly pays reasonable timber duties to ensure, official protection under a special law.

Lastly, the income from Public Forests belongs to the Treasury, and *pro tanto* relieves the public from taxation; it needs, therefore, special facilities for its direct and punctual realization without the delays of a civil suit. Other reasons for a special Forest law might be added, but these brief outlines will be sufficient.

### Present state of Forest Law.

The present lectures must necessarily be based on the *Indian* Forest laws. The time may come when your classes are filled not only by men going to India, but with an equal or superior number going to the Forests of the various Colonies—Canada, Australia, or the Cape; and it may then be necessary—and by that time it should be possible—to lecture on specific and well-drafted Local laws of these Colonies. At present hardly any such laws, as far as I have been able to ascertain, exist. I have seen one or two, but they do not appear to me to have gone beyond an imperfect and tentative stage; and to be in general very like rough copies of the Indian Acts. Imperfect as these latter are, it is by reason of defect, not of excess; they have not been able to provide definitely for many matters, which I believe could now be defined with advantage. But they have this merit, that as far as they go they are in the right direction, at least in general. And it will be found that by taking them as the basis of illustration, we shall be really offering a sufficient explanation and commentary on the general lines of such Colonial Forestlaw as is in force.

Of English Forest law, I have hardly anything to say, because there is really no "Forest law" of such a character as I am about to define. Of old there were strict and often barbarous laws; and although, from time to time, in such old writers as Manwood, passages may be found which show gleams of a nascent idea that forests are to be valued as stores of timber for ship-building and the like, in general the care of the forest was solely directed to the preservation of game, and the trees and bushes as a cover for it. As the barbarous old laws fell into disuse, successive areas of the forest were "disafforested," and only portions of the old Crown forests now remain: these are largely preserved for their picturesque beauty; their utility is less thought of—at least beyond the occasional making of plantations,[1] and even these are frequently denounced by the picturesque-loving public, and still more by the holders of extensive "rights of common"—a class whose enjoyments and privileges have never been legally defined with reference to Forest conservancy, still less regulated and made conformable to the due maintenance of the Forest as such. A chaos of continually amended and complicated "Enclosure Acts" relating to the powers which Lords of the Manor and others possessed or claimed, of taking away the forest and enclosing it for their own use, are the only Statutes that belong to the class of Forest law in the modern sense. And there are, of course, general rules of "common law" regarding rights of common, such as are explained by Mr. Joshua Williams in his Lectures on "Rights of Common" (1880). Cooke's edition of Wingrove on Enclosures (1864), also explains some principles.[2] No systematic law for demarcating forest estates, settling rights, or dealing with forest-offences, exists. Where large forests belonging to private owners are found (in Scotland or elsewhere), they often owe their origin to plantations made on private land, which

[1] Students will recollect the oak plantations in Windsor Park, made at a time when there was a scare about ship-building becoming impossible for want of oak.

[2] The idea that "rights of user" were subject to limits and to regulation, was, however, a very ancient one. In the ninth year of the reign of Henry III a *charta de foresta* granted a relief against the old forest laws which destroyed many rights in the interest of the king's game. In England, says Cooke (p. 5), rights of common were known to our oldest text-writers, nearly as they are known to us at this day. Bracton, one of the earliest and most venerated of these, wrote upon the subject in the 13th century.

is not, as a rule, subject to any rights of user; and their protection is effected by the ordinary law of trespass, aided by a great deal more fencing than would be possible in the large areas of natural forest that we find in India and the Colonies.

## 2. The Law in force in India.

It is then to the Indian Legislation that I purpose to direct attention; and I shall illustrate its provisions from time to time with references to Continental legislation; because it is always valuable, to see what is enacted as law in countries where forest business has long been on a rational footing, and where the importance of forests has been fully recognized, and where therefore the real requirements of the case are likely to be best understood. The enactments of foreign countries cannot of course be quoted as direct authorities; but in any question which depends on general equity and reason, the fact that such and such a principle or practice is recognized by sound systems of foreign law, ought not to be without its due weight.

I do not propose to take up your time by going into the history of Forest Conservancy in India; it will be sufficient to say that the first attempt to enact a comprehensive Forest law was made in 1865. But the Act was quite imperfect, and indeed unsound in principle: it professed to deal only with "Government Forests," and what those forests were it attempted to *define*. This alone, as we shall better understand presently, was enough to ensure failure: but worst of all, it made no provision regarding rights of user: it assumed that they were to be let alone—neither defined nor regulated; the "rules" (carrying penalties) which the Act empowered the Local Government of the Provinces to make, were not to affect any rights.

It is only remarkable that Forest administration was not utterly choked by such a law: but as a matter of fact, in the first place, rules were locally made and enforced without a too nice attention to their legality;[1] in the next place, in several districts (*e.g.* those of the Central Provinces,) there were no rights that interfered with simple

[1] In Burma, where owing to the value of the teak forests, forest matters had always had an exceptional importance, an Act was passed in 1869 specially to validate and cover any deficiencies of the Rules propounded under the Forest Act of 1865.

conservancy rules: in the Panjáb, some old local Rules of 1855, (which have special force as law under the terms of the Indian Councils Act of 1861)[1] were found to be (to some extent) useful. Some of the most important "deodar" forests in the Himalaya, are in the territories of native princes, not subject to British law; and as the forests are managed by Government officers, under Leases (whereby annual sums were paid to the Chiefs and the entire management placed in the hands of the Forest Officers), conservancy is possible, without reference to any Act of Legislature. That is a very general outline of the state of things. There were of course, here and there, in all provinces, tracts of forest in which rights of user were not found to interfere with control; and thus taking all in all, the conservation of forests made progress in spite of the want of a Forest law.

Meanwhile drafts of a new law were tentatively made, and circulated for opinion. These resulted in new drafts and further discussion, till at last, in 1878, the Forest law now in force was passed (Act VII. of 1878).

This law still met with a good deal of opposition. The draft—in itself necessarily imperfect,—was much altered (and that not for the better) before it became law. The idea of forests, as we have to understand the term, is always unfamiliar to the minds of Englishmen, because we do not, in our own islands, need forests for climatic reasons; and because we have been long accustomed to depend on foreign countries for imported timber, and think but little of growing our own. In India also, there is the very natural if not salutary, fear of rousing popular opposition to measures: and there was formerly also, a long-lived belief which it was very hard to overcome, that really forests *do not want conserving*; forest fires and the like, people urged,—had always existed, and yet the forests continued: and it is only in exceptional cases where you had very valuable forests of teak and such like timber-trees, that you need to assert a strict conservancy, or regulate the exercise of grazing and other rights. As for the ordinary run of common forests, capable of yielding small wood, fuel, and inferior trees sufficient for cottage-

[1] When provision was being made for the more complete establishment of Legislative Councils in India, it was found that besides the old Regulations and earlier Acts that had been enacted by Legislatures under older Statutes, there were—especially in the newer "Non-Regulation" provinces—local rules and orders which had been practically enforced but had not been made by any Legislature. The Act of Parliament of 1861 declared that these were to be regarded as legally binding, *i.e.* that they had the force of law, provided they had been made with the sanction of the Governor-General in Council.

beams and rafters and for making agricultural implements; capable also of yielding grazing for the great bulk of ordinary popular requirements, you need not really shut them up or do anything at all to protect or cultivate them: let them all alone and let people do what they will, so long as they do not commit gross acts of waste,—tree-burning and the like,—the forests will go on yielding what is wanted without fail. The utter fallacy of all this, is well known to those who have had even elementary teaching and experience of practical forestry. Gradually however, such ideas began to lose their force. I think every one has now come round to see that forest fires are an unmitigated evil; and the actual exhibition here and there of a forest restored by proper measures, has enlightened some persons as to the possibility of improving even the worst and poorest forests, and clothing bare and waste ground with useful vegetation.

I mention these details, not only because they account for the only partial merit, as well as the elementary nature, of the Forest law,—leaving as it does so many points not distinctly ruled—but still more because it is essential to prepare you to find, that the truest and best principles will not always make their way except slowly and by imperfect steps. You must not suffer yourselves to be discouraged by opposition; still less must you suppose, that it has been in vain for you to learn true principles of Forest law because the authorities will not always accept them or carry them out. It is not so: true law will make its way in the end; and when it does, it will be largely owing to the aid of officers who push their way wisely, modestly, cautiously, and in a full view of all the difficulties of the situation, and showing due sympathy for the pressing wants of an ignorant population.

Good forest officers will try to prove by actual effects produced in forests under their charge, that their principles are true. In the end, with the aid of such practical examples, they will succeed in convincing some and refuting others, and so will gradually attain to such rules of practice as they desire.

The Act of 1878 is now read as amended by Act V. of 1890.

The amendment only deals with some points of detail which do not call for separate explanation, but will be noted in speaking of the specific sections which they affect.

The Act of 1878 having certain features which will appear further on, was thought unsuited to BURMA: and the MADRAS

Government were also, for other reasons, unwilling (in 1878) to have it enforced in the Southern Presidency. In the course of time, therefore, special Acts were passed for these provinces. We have accordingly, in India, besides Act VII. of 1878, also to take notice of—

(*a*) Act XIX. of 1881 (as it stands slightly amended by Act V. of 1890 in the way just stated) for Lower Burma; and for the Upper Burma forests (which only came under control in 1886 by annexation of the province) we have Regulation VI. of 1887, which practically is the same as the Act, with certain local adaptations.[1]

(*b*) Madras Act V. of 1882. This is virtually an "edition" of the Indian or General Act of 1878, but with certain special provisions which however nowhere touch the salient principles of the Indian Forest Law.

(*c*) In certain parts of India, there are special districts which have Forest Regulations of their own.

In the HAZÁRA district (a mountain country on the N.W. frontier of the Panjáb) the forests were in a somewhat special position owing to the Government having never attempted before, to separate its rights from those of the population, who had thus come to look on the forest as in some sense theirs. Moreover it is here necessary (in a mountain country) to take special care of village forests which may have an important *protective* influence against torrents and landslips, which have already done great damage. Regulation II. of 1879 is the Law.

For AJMER and MERWÁRA (under the Chief Commissioner of Rájputáná) there is a special Regulation, No. VI. of 1874.

BERAR has forest rules of its own.[2]

[1] When any new province, or backward part of the older provinces (inhabited by primitive tribes, &c.) is found to be in a state in which the ordinary law—Acts and *old* Regulations (before the date of the Acts) cannot conveniently be applied, the Secretary of State for India can (under Act of Par. 33 Vict. c. III.) declare that it is desirable to apply the provisions of the Act to them. That being done, special Regulations, not made in the Legislative Council, may be applied by the Governor-General. Accordingly the Scheduled districts (under Act XIV. of 1874) and other territories declared by the Secretary of State (which then practically become "Scheduled Districts") are usually provided for "Regulations." These are distinguished from the old Regulations of Bengal, Madras, and Bombay (some of which still remain in force) by the date. All *old* Regulations *date before* 1834, when the Legislative Council was first created. The modern (33 Vict. c. III.) Regulations are all after 1870.

[2] Berar, it will be remembered, is a special territory—not technically British

British Biluchistán is governed by a Forest Regulation, No. V. of 1890.

It will generally be found that these "Regulations" and rules contain no new principle. They are in fact always simplifications of the Indian or Burman Forest Acts, with such additions as local conditions necessitate. They will rarely call for any detailed comment, but will be cited, when they present anything worthy of notice.

I must here repeat what has been incidentally noticed in another connection, that a large extent of Timber-Forest in the N.W. Himalaya (and perhaps elsewhere) is under Departmental management, and under full legal control, not by virtue of any law of British Territory, but because such forests being in the territories of Native States, have been *leased* by the Chiefs either for a long term or in perpetuity; and so all arrangements regarding rights of user, and penalties for Forest offences, &c., can be carried out under the lease, the Chief agreeing to enforce the rules.

### 3. Rules under the Forest Act.

Before approaching the consideration of the three principal Forest Acts for India and Burma, it is necessary to point out a peculiarity common to them all. Only general provisions and principles are directly enacted; and power is given to the Local Governments[1] to make *Rules*, suitable to the various local peculiarities and conditions, which in fact supply such *details* as the Act itself could not conveniently enter into. The Rules are made *on certain subjects* indicated in the Act; and to prevent the possibility of some matters being left out, a further provision is added, that rules may be made—generally—"to carry out the provisions of the Act." It will be necessary therefore to devote some brief paragraphs to the consideration

territory, but a province which is, by treaty, subject (in perpetuity) to British administration. The Laws and Regulations therefore do not apply *proprio vigore*: the country is governed by the orders of the Governor-General, who can make, on his own authority, any rule he pleases. By *Gazette* orders, "Acts" may be directed to be followed; but it is not as law in themselves, but as expressing the Governor-General's wishes on the subject. This is the technical view: of course in practice, Berar is as much governed by definite rules and laws as any other province.

[1] See this term explained at p. 195.

of these *Rules*, which it will be observed, have (on being duly notified and sanctioned) the *same* force as the provisions of the Acts themselves.

Forest officers are always consulted about the drafting and changing (as occasion may require) of such Rules; and it is important that they should understand what they are and how they are made.

The idea of leaving the *details* of a legal provision to be worked out by local rules, while the *principles* are laid down in the Act itself, is not peculiar to India. The French Forest Code of 1827 is supplemented by an "Ordonnance," which is nothing less than a set of subsidiary rules, though not quite of the same nature as Rules made under the Indian Forest Act.

Rules under the Act, are necessarily of the same general character as the Act itself. In other words, the details which they supply are matters which *properly come within the scope of legislation*, that is, involve the creation, extension, or limitation, of some right or obligation, or impose some penalty or forfeiture. At the same time, the Rules must be within the scope of the Act, *i.e.*, carry out what is already in outline provided; they cannot be made to give wholly new powers, or to amount to further legislation beyond the Act itself. Rules under the Act do not concern themselves with matters of merely executive regulation or departmental practice, which can be prescribed by executive authority, and do not need legislative authority to give them force.

If we go through the Indian Act,[1] we shall find that there are various sections which give power to make rules; these are sections 5, 14*c*, 15, 25*b*, *i*, 27, 31, 41, 51, 75.

All rules, without exception, have the force of law so far as they are consistent with the Act (section 77), provided they have been published in the local official Gazette.

It will be observed that rules are to be made from "time to time" or (as in the Burma Act) it is said, in a separate section once for all, that all powers to make rules, &c., may be exercised from time to time. This is a legal form which obviates the objection that power given to make rules (without such qualifying phrase) could only be

[1] The Burma and Madras Acts are so similar that the student can easily make the comparison for himself.

exercised once, and would be exhausted when once rules had been made, so that no further addition or amendment, or new issue of rules, would be possible.

It is declared that rules for the management of village-forests under section 27, rules regarding Protected Forests (section 31), and rules regarding the control of timber in transit (section 41), require the sanction of the Governor-General in Council, as an additional condition to their legal validity. The Burma Act has omitted this not very necessary provision. The chief value of it is that in this way a certain amount of uniformity in the rules is obtained; and it may be considered that, as the rules under section 41 (for example) may practically impose rather important restrictions on the ordinary liberty of transporting property, and deal with acts which may be serious offences, it is right that the highest authority should consider, and sanction, the rules and the penalties imposed.

The subjects on which the rules may be made are as follows:—

1. For the guidance of Forest Settlement Officers (sec. 5) as to the making of fresh clearings in land proposed to be constituted as forest estates.
2. As to the regulation of rights admitted to exercise in the Reserved Forest (sec. 14*c*).
3. On the subject of commuting or buying out rights (sec. 15).
4. Regarding the preservation of Reserved Forests.
   (*a*) As to lighting fires (sec. 25*b*).
   (*b*) As to hunting and fishing in reserved forests (sec. 25*i*).
5. For the management of village forests.
   These may:—
   (*a*) Regulate the system of working;
   (*b*) Prescribe the conditions under which the village enjoys the produce, &c.;
   (*c*) Lay down the duties of the village as to the protection and improvement of the forest (sec. 27). (Sanction of Governor-General in Council necessary.)
   (These are not provided for in the Madras Act.)
6. For the management and utilisation, as well as for the protection, of areas called in the Indian Act "Protected Forests" (Section 31). The subjects of these rules are specified in section 31[1]

[1] Rules under section 31 are somewhat peculiar: the subjects on which they are to be made are specified, but it will be observed that the penalties in sect. 32

(sanction of Governor-General necessary). As this class of Forests does not exist under the Burma or Madras Acts, the corresponding rules provide for the protection and utilization of trees and natural produce of lands not constituted Forest Estates.

7. For the control of timber in transit, whether by land or water. Separate rules are usually made for each kind of transit. The subjects are specified in section 41. (Require the sanction of the Governor-General).
8. For management of *drift timber*, salving and disposing of it—subjects specified in section 51.
9. For prescribing the *duties* of *forest* officers (section 75*a*). Remarks on these rules, and on the meaning of the Act where it speaks of "*a*" or "*any*" forest officer or "*the*" forest officer, will be made when we come to deal with the "Forest Service."
10. Regarding payment of *rewards to informers* (section 75*b*).
11. Rules which may be required in some places where *valuable trees*, such as teak, blackwood, and so forth, *belong to Government*, but the *land on which they stand* is the property of (or in occupation of) *private* persons; to protect the *growth* and *reproduction* and provide for their *disposal* (section 75*c*).
12. General *subsidiary rules* which may be made on any subject necessary in order "to carry out the provisions of the Act" (sec. 75).

Some of these rules are such that they prescribe conditions and terms, and do not require any penalty. But in all cases where a breach of a rule is clearly a penal one, there is either a special penalty as in secs. 25, 31, 42, 51, or there is a general penalty as provided by sec. 76 (see further on this subject, p. 431 *ff.*)

It will be asked, what is meant by the "Local Government" which makes rules? It will be remembered that the provinces of India were gradually acquired, and that some were attached to the older Presidencies (Bombay, Madras, and Bengal); others were separated under Lieutenant Governors. All these were called "Local Governments." Other acquisitions like Oudh, Burma, the Central Provinces, Assam, Ajmer, &c. were not made into "Local Governments;" but

apply partly to breaches of rule as such, and partly to acts which are offences against the declarations or prohibitions notified under sect. 29. It is obvious that rules cannot be made to clash with such prohibitions. For example, if a prohibition has been issued against clearing land for cultivation, this is absolute (as long as it is unrescinded), and rules cannot be made to allow cultivation under certain conditions.

were (technically) taken under the direct management of the Government of India; they are called "Local Administrations" because the Governor-General is the "Local Government," and he appoints a *Chief Commissioner* on the spot, to "administer" his orders. As however it would be inconvenient for the Government of India to be referred to for everything in which the orders of Government are requisite, provision is made to delegate to the Chief Commissioner, a number of the powers of the Local Government. The General Clauses Act I. of 1868 (sec. 10) which defines (once for all) a number of terms that are constantly made use of in Acts of the Legislature, declares that unless there is the express provision (or the context implies) to the contrary, "Local Government" *includes* "Local Administration." Practically then, all ordinary powers of the Local Government are exerciseable by the Chief Commissioner, unless there is any direct provision to the contrary.[1]

In drafting rules it should also be borne in mind that the terms must be consistent with the Act. The language should be precise and yet simple. Vague or general phrases which can be twisted to two or more meanings, must be avoided.

It is of great importance that words which are *defined* in the Act, should, when used in the rules, bear the legal meaning they have in the Act. And to secure this, it is well that the rules should open with a clause stating that all terms used in those rules and defined in the Forest Act, have the same meanings as they have in the Act.

When rules are made under sections 31, 41, 51, &c., where a list of the topics or heads of rules is given by law, care should be taken that each rule can be clearly shown to come under one or other of those heads. If further points are to be ruled which are not so included, but still are within the general terms of the law, they should be exhibited as made under the *general subsidiary* powers of Section 75.

Matters of administrative, departmental, or executive order, which

[1] In Acts previous to the 3rd January, 1868 (on which day the General Clauses Act received assent) the definition does not of course apply, and then the term "Local Government" was used strictly; and when the Governor-General desired to delegate his functions as Local Government to the Chief Commissioner, who was the Local Administrator of his orders, he did so by a special Act, or by words in an Act. Thus, in 1867, the Act No. XXXII. was passed to delegate certain powers to the Chief Commissioners of Burma, the Central Provinces and Oudh. This definition in the General Clauses Act does not operate to delegate powers if there is any special law to the contrary; when Assam, for instance, was (in 1874) separated from Bengal, special Acts were passed which made the Governor-General the Local Government, and he had by notification expressly to delegate certain powers which he had (as Local Government) to the newly created Chief Commissioner; powers of a Local Government under Act VII. of 1878, are among them (Notification No. 522, Home Department: *Gazette of India*, 18th April, 1874, page 182).

do not require the sanction of the law, and which the Local Government, or even the Conservator or the Divisional Officers, can order as an executive matter, should not be introduced, as already explained. It may indeed be sometimes necessary, in order to make a subject intelligible, or to obviate any misapprehension, to make mention of some matter which does not require actual legislative sanction; but this should be introduced only when absolutely necessary, and as sparingly as possible.[1]

## The Topics of Forest Law.

We may now proceed to consider the Forest itself—as to its general features, and its structure. The Law, it will be observed, has to provide for *five* main heads or topics of legal requirement in respect of Forest administration.

**(I.) It separates or distinguishes from the general area of lands in the country, what are the "Forest Estates" or areas subject to the law; and it does this in several ways:—**

(*a*) It regularly constitutes State or "Reserved Forest."

(*b*) The Indian Act creates a class of Forest Estates less perfectly and regularly constituted, which it calls "Protected Forest." The Madras and Burma laws do not recognize this; but substitute certain general protective provisions for all wooded, grazing, and waste lands, which are at the disposal of Government, but are not yet either made into regular forests, or given up to cultivation.

(*c*) The Indian and Burma Acts (not Madras) contemplate the formation of *Village Forests*—Forests for the benefit of villages, but under a certain degree of State control.

(*d*) The Acts contemplate subjecting privately owned forests and waste-lands, to Forest control, in certain cases only.

**(II.) It provides for separating the rights of the State from those of private persons; for *defining* the rights; for *regulating* their exercise (when left in the forest); for *buying them***

[1] It is convenient to have all the rules and orders relating to a subject in one group or series, so that the public as well as the officers who have to work the rules, may understand the whole subject both in its departmental and legal bearings, and there is nothing whatever to prevent the local authority printing and publishing the rules which require legislative authority, along with other notifications of fact and rules of practice, in such a form that the whole may be found in a convenient pamphlet. but in drafting and notifying Rules, the separation should be observed.

***out*** **in certain cases; and for preventing the** ***growth of new rights*** **as burdens to the forest, in the future.**

**(III.) It** ***protects*** **(in various degrees) the different classes of Forest or other lands which it has made subject to its provisions, by:—**

(*a*) Preventing offences, and adopting measures to forestall or put a stop to accidents by fire, &c.

(*b*) Punishing offences, *i.e.*, acts which it specially provides to be offences against the forest.

**(IV.) It extends a similar protection to the** ***produce*** **of the** ***forest*** **and to all timber (whether forest timber or not) while** ***in transit*** **to the market or other destination.**

**(V.) It constitutes a staff of Forest Officers, giving them legal powers, and imposing certain duties and liabilities.**

On this enumeration of the main subjects of Forest law, several preliminary observations become necessary.

In the first place, what is a "forest"—*i.e.*, for the purposes of the law?

It was formerly thought, that the proper course would be to *define* a "forest," as distinguished from other portions of the surface of a country; and then the law would apply to all areas coming within the definition—would apply, that is, to the extent required, according as those areas belonged to the Crown or to the State, or to a Corporation, Community, Institution, or to a private owner; or were shared between the State and some private or corporate owner (as is sometimes the case). But as a matter of fact, it has now for some years been recognised that no legal definition is practicable or useful.[1]

[1] The old Act of 1865 defined forest as "land covered with trees, brushwood or jungle, and declared to be Government forest under the Act."

This is obviously defective. No definition of forest, at any rate suitable for legal purposes, has as a matter of fact, ever been framed. Several books give a *description*, which is not a *definition*; such as that "a forest is a whole consisting of soil, climate, and certain growths, &c." (see Fiochot: *Traité Générale*, p. 99). In the article (Forêts) in the *Répertoire de Jurisprudence Général* of Dalloz (Vol. 25, Paris, 1849), forests are defined as "lands whose principal products consist of timber trees or firewood." "Lands" (it is added) "which, though bearing trees, give, as their chief product, fruits hanging from the branches, are (not forests but) orchards." It is easy to see how very insufficient this would be, at any rate for legal purposes, in India.

In early historical times a forest was looked upon as a place where beasts of the chase were protected. The writer last quoted says that some have tried to derive the word forest (*foresta*) from the words "*ubi fera stat*" or "*ferarum statio*," the place of wild beasts.

Every definition of a forest that can be framed for legal purposes, will be found either to exclude some cases to which the law ought to apply, or on the other hand, to include some with which the law ought not to interfere. It may be necessary, for example, to take under the law a tract of perfectly barren land which at present has neither trees, brushwood, nor grass on it, but which in the course of time it is hoped will be "*reboisé*;" but any definition wide enough to take in all such lands, would also take in much that was not wanted. On the other hand, the definition, if framed with reference to tree-growth, might (and indeed would be almost sure to) include a garden, shrubbery, orchard, or vineyard, which it was not designed to deal with.

It is now recognized that for the purposes of the law it is quite sufficient,—

(*a*) To provide steps for demarcating certain areas and constituting them Forest Estates; in which case of course the areas become subject to the law; and

(*b*) In all other cases it is practically sufficient to refer to "forest" in its undefined, but ordinarily accepted, sense.

In any case where a still wider meaning is required, and it is desired to avoid any question, the term "forest or waste land" is used; which of course covers everything that is not actually cultivated field or meadow-land. For example, supposing a forest officer proceeded to levy duty on, or exercise control over, some "thatching grass" loaded on boats, in transit; such material is (according to the Act) only liable to his notice if it comes from a

Manwood (3rd edition, 1665 A.D.) gives a similar account of forests, and goes on to say that forest law is for the protection of the game. This was indeed the purpose of all *early* forest laws. (See *Die Staats Forstwirthschaftslehre*, von Berg, Leipzig, 1850, pp. 1-3). See also a specimen of Forest law of the 11th century which I translated in the "*Indian Forester*" (Vol. IV. p. 161). The passage from Manwood is as follows:—

"A forest is a certain territory of woody grounds and fruitful pastures, privileged for wild beasts and fowls of forest, chase and warren, to rest and abide in the safe protection of the king, for his princely delight and pleasure; which territory of ground so privileged is meeted (meered) and bounded with unremoveable marks, meets (meeres) and boundaries either known by matter of record, or else by prescription; and also replenished with wild beasts of venery or chase, and with great coverts of vert for the succour of the said wild beasts to have their abode in. For the preservation and continuance of which said place, together with the vert and venison, there are certain particular laws, privileges and officers belonging to the same meet for that purpose, that are only proper unto a forest and not to any other place" (p. 41). ("Vert" means the "green" grass, trees and bushes of the forest.) The edition of 1665 uses the term "meet" and "meeted." In the quotation in Williams, probably from the earlier edition, it is "meere" and "meered;" both terms refer to boundary marks.

"forest:" and if there was a dispute, it would be a question of fact, (for the Court or the Magistrate) whether the material came from what was a "forest" in the ordinary sense of the term, or not. So again, if interference were called for with a "private forest" which is not declared, demarcated or notified under the Forest Act, no question would arise, because the Act speaks in such cases of "forest *or* waste-land," and that would include everything (not being cultivated fields) with which, in the interests of safety against land-slips, torrents, &c., interference could possibly be required.

In short, for all legal purposes, it is quite enough to understand that the law applies to demarcated or known areas notified as subject to the special law, and (in certain cases) to forests in the general, ordinary, and practical, sense of the word: all such being cases in which the use of the general term gives rise to no difficulty.

All the *definitions* of terms (into which the word "forest" enters) as used in the Acts, follow this general consideration. For instance, "Forest Officer" is a person who is appointed in a certain way, to "carry out all or any of the purposes of the Act," or to do what the Forest Act requires a "Forest Officer" to do—no matter where. "Forest produce" is expressly defined to include (*a*) "timber" and certain other products, whether from a forest or not; and (*b*) a large number of other products (vegetable, animal, mineral and miscellaneous), only when brought from or found in, a "forest" in the above general sense. But as "timber," &c., is taken under the protection of the law, whether cut in a *forest or not*, it is always separately mentioned: that is the reason why so many sections refer to "timber or *other forest produce*." "Forest produce" by itself would exclude a number of articles if not found in or brought from a forest: but by the use of both terms, the extended meaning is conveyed, viz., "timber and certain other products from anywhere; other forest produce from a forest (in the above sense)."

The term "Forest Offence" again need raise no question about what is or is not a "forest;" it means anything punishable under the Forest Act, or Rules made pursuant to it.

As then the Forest law will chiefly and directly apply to lands which are specially notified and dealt with in a certain

way—and thus become *Forest Estates* of one kind or another, the next point for our consideration is, what lands in India are available to be constituted Forest? And what are the general conditions under which those lands are found?

In order to answer these questions, I must here introduce a special Lecture to explain what is the origin of the State Forests: or in other words, from what *basis* the Act proceeds. For, you will observe, on taking a first glance at the Act, that it commences by directing certain steps to be taken with reference to Land which is the property of Government, or over which Government has (certain) rights. Before we can describe what these steps are, and what different kinds of Forest Estate the Law proposes to create and then protect, we must understand in general, how (in India) Government comes to be owner of certain lands out of which Forests can be constituted; and in explaining that, it is unavoidable as well as generally desirable, to consider the whole subject of Government or Public Property, as to its nature and origin.

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# LECTURE XV.

## ON PUBLIC OR "GOVERNMENT" PROPERTY.

THIS Lecture may be regarded as in some degree an episode to our main subject, and gives an account of *how property comes to be owned by the State* in India.

When once rights of property in land are recognized, they pass into various hands: but in a great majority of cases it is into the hands of private persons. Sometimes these are single persons; but sometimes a number of joint-owners (co-partners or co-sharers) hold property.

The latter often happens in India, where property (among Hindu and other tribes) is regarded as belonging to the united family; so that when the house-father dies, all his sons succeed together in equal shares, grandsons representing a son who has predeceased the father.[1] It is to this principle that we owe one considerable class of "village" estates, chiefly in Northern India, where the entire estate is held in shares, these shares being the family divisions or lots represented by the now multiplied descendants of a founder, grantee, or other person who originated the estate. Sometimes indeed, joint-villages (held in shares) represent a voluntary association of colonists; sometimes (as on the N. W. frontier) they are the result of the location of tribes, whose family organisation is joint. But these are matters belonging to the interesting subject of Indian land-tenures: we can only mention the subject in passing as an illustration of ownership by joint or coparcenary bodies.

Very often land is held by Corporations or other "artificial" Persons. For instance, property is held by "Institutions"; this is not common in India, but in Europe it is. Universities, Colleges, Hospitals, and various forms of Religious corporation, hold property: so do corporate "Companies" (like the "Mercers," "Merchant Taylors," &c., in London).

[1] Collaterals succeed in default of direct issue. Of course the text does not give any of the details of the law or custom of inheritance, either Hindu or Muhammadan.

Again, under some forms of European Constitutional law, Corporate towns, Rural Communes and the like, hold property. The day will probably come in India, when village-bodies will hold regular Forest-estates. At present we have many areas popularly called "Village-Forests," but they are not really Forest properties like the Communal Forests or the Cantonal Forests, of France or Switzerland. They are either areas of "Waste" land which, although they are the property of the co-sharers, still are liable to be divided up for cultivation, and have no permanent existence as "Forests;" or they are areas of land in which the right to the soil remains with the Government and only the *use* is made over to the village, to supply its wants in the matter of grazing and wood-cutting.

But what we are chiefly concerned with here, is the fact that the Government itself, *i.e.*, the State, holds property. In England there are estates belonging to the Crown, not to the Sovereign as an individual. For example, Windsor Forest is Crown property, Her Majesty could not dispose of it by her personal will or testament, nor by sale under any private contract. Osborne House, on the other hand, though a royal residence, is Her Majesty's private property, not a Crown Estate. There are many public properties under State control also, which are not technically Crown estates.[1]

In India, various lands, buildings, and other objects, are said to be "Government Property,"—to this I wish more especially to draw your attention.

As a matter of fact, before 1858 (when the Crown resumed the delegated functions of the East-India Company, and itself undertook the direct Government of our Indian possessions), a large amount of property in land, houses, etc. belonged to the Chartered (and Corporate) Company; and by the "Act for the better Government of India," 1858, this all was transferred to and vested in the Queen "for the purposes of the Government

[1] I do not enter on any detail as to the rights which the State or the Crown possesses (in England) to certain valuable minerals and other objects. Crown estates in England are for the use of the sovereign for the time being; it is merely matter of accident that the Crown has now leased these estates to the Public (*e.g.*, the Public Parks), receiving in return a certain money payment. This agreement is usually renewed as each successive sovereign comes to the throne; but it does not affect the distinction in nature spoken of. Public or State properties are for *public* uses, according to their kind.

of India."[1] In this respect, Her Majesty is represented by the "Secretary of State for India in Council."

Now when this property was in the hands of the Company, it was liable to suit, to execution and other legal process, just as much as any other property of Corporate owners; accordingly when it passed to the Home Government, it was thought right to continue its liability to the same conditions. That is why, while no suit in England lies against the Sovereign (though there is an analogous proceeding by *Petition of right*) in India, the Government can sue and be sued, in the name of the Secretary of State for India in Council.

Property in land, money, goods, stores, and other "real and personal estate" which belonged to the E. I. Company, or has been acquired for the purposes of Government, is liable "to the same judgments and executions as it would, while vested in the Company, have been liable in respect of debts and liabilities lawfully contracted and incurred by the said Company." This refers to property which Government holds (for profit or value—as any Corporate person might hold it), and does not refer to property held in a purely Sovereign capacity or as Public Trustee (if I may so say), as for instance the proceeds of revenue and taxes lodged in the Public Treasury, the ground occupied by a Grand-Trunk-road, a State Railway, a military fort, a barrack, or a public office.

"Government" (or the State) in India, has come to own land and other property in various ways.

A preliminary explanation is here necessary with reference to the general law of property, as affected by a conquest or change of Government. Modern and civilized law only recognises conquest as affecting public or State property (of the deposed or superseded Government) and not private-property—which is not interfered with. The political system or the form of administration, is superseded; but the laws which regulate private property are always respected; and if (as in India) the law of the conquering State alters the older law in detail or in form, still the new law only establishes or places private rights on an intelligible or secure legal footing—one which they may not have possessed before. The

[1] 21 & 22 Vict. cap. 106, sec. 39, &c.; also sec. 65.

essentials of all reasonable private rights are preserved, and the private or personal law of tribes and castes is always respected [1]

The main heads of Government or State property may be enumerated as follows (for the purposes of our study) —

I Property held in virtue of ancient (or more recent) State rights—including Property which was passed on to our Government, having been held by former Governments or Sovereign Princes, as such Under this head we include the important subject of the right of the State to all unoccupied waste lands.

II Lands occupied by public roads, *i e*, great public lines—not merely roads in cities, towns, stations and districts, the control of which may be vested in Municipalities, Committees, Military Cantonment, authorities, etc, Canals, Lakes, Railways.

III Property acquired under the special law for the "Acquisition of land for public purposes"

We will proceed to examine each of these heads in turn

## (I) Property held in Virtue of Ancient (or former) State Rights.

One of these rights is that of *escheat*.[2] When no heir exists to property, the State takes it. This was known to the Hindus

[1] See *Broom's Constitutional Law* (Ed 1866), p 21 The new Government has of course the *power* to alter the law or custom, but it only does so when there is a better principle to be asserted or an abuse to be corrected Thus in India all reasonable customs of inheritance, minority pre emption, marriage &c, &c, are respected, but bad customs are abolished such, for instance, as that which deprived a man of his property or other rights on changing his religion The student will recollect that in such a case as the conquest of Alsace and Lorraine, the French law as regards private property, was not interfered with

[2] See Regulation XIX of 1810 (preamble), which however assumes that escheats belong to Government and does not say so, only providing that such property shall be dealt with in a certain way This Regulation applies to the Lower Provinces (Bengal) and to the North West Provinces It is not in force in the Panjab Oudh, or Central Provinces nevertheless houses gardens, and lands do occasionally lapse to Government by escheat in these provinces, so that the matter must be regarded as one of general law or principle which has been specially recognised as existing by the Regulations in Bengal See also 16 & 17 Vict cap 95, sec 27 Act X of 1865, sec 28, and several law cases, *e g The Collector of Masulipatam* versus *Cavally*, 8 Moore's Ind App, p 500 Bengal Law Reports P C 87 &c The case first alluded to puts the right on the general ground that if there is no private owner for an estate the State must take it for the public benefit The right of the King to property left without heirs, or to ownerless property for which a proclamation has been for three years issued without effect, is mentioned in the Institutes of Manu (Chap VIII 30) See Elphinstone's History (5th edition, 1866, p 23) The Hindu term for an escheat

by the name of "gáyál" and "gáyárí," and to the Muhammadan law as "nazúl."[1]

In the event of rebellion or grave misconduct, the Estates of chiefs, &c. can be, and have occasionally been, *forfeited* by an Act of State.[2] By the criminal law also, property may be forfeited in certain cases of grave offence;[3] not only property in possession, but also during the whole term of the punishment (as long as the sentence remains in force) so that any property acquired (*e.g.* by inheritance) goes to Government. Of course it is optional with Government to enforce this to its full extent or not, as it pleases.

By the law of all the Provinces (agreeably to universal custom), the land-revenue is held to be secured by an implied, if not declared, "hypothecation" of the land assessed. In other words, the land-revenue forms an absolute first-charge, and takes precedence of all other claims whatsoever, on the land. If the revenue is not paid on falling due, Government may (under the various Provincial laws) sell the land to get in the arrears. In Bengal as regards Permanently settled estates, sale is the first and indeed only process of recovering. In the other Provinces (where there is no general Permanent-Settlement) various other processes are first adopted, and sale is resorted to only in the last instance. In the case of a sale if no purchaser appears, the Government may itself take over the land. In Bengal, various estates are held in this way—known as "Khás" estates.[4]

It also happens, that there were various houses, gardens, and sometimes plots of land and forests, that belonged to former rulers, and these (commonly but not quite correctly called

refers to the fact that the owner has disappeared (*gáya*, gone) The Muhammadan Government always claimed the right of escheat, hence the more recent term for it, of Arabic origin, has come to be the one commonly used.

[1] In practice "nazul" is applied to any lands, fields, or houses which happened to belong to the former Ruler, and are now usually granted to local committees, and utilized for public purposes.

[2] *E g*, after the Mutiny several Chiefs' States were confiscated. In Oudh all the rebellious Taluqdars' estates were declared confiscated, but this was only done with a view to re-establishing these estates on a legal and proper basis, and they were re-conferred on all who were amnestied on their submission.

[3] Ind Penal Code, sec 61.

[4] This sort of land-holding by Government is only common in Bengal In other provinces where the system is different, land is very rarely sold, and if sold, the policy of the Government is against retaining it in its own hands. It is always farmed or granted to some one.

"nazúl" property) now belong to Government. In the Panjáb, there are (or were) in the city of Lahore, several large houses and gardens that had passed in this way. In one place there is a "rakh" or area of grazing land, which Maharája Ranjít Singh had kept specially for his horse-stud. In other places are hunting-parks or areas reserved for game, &c. by former princes ("Shikárgáh"). In Burma, there were "Royal Lands"; and so in Coorg and other places. The Muhammadan princes had what were called "hawelí" lands (reserved for the profit of the Sovereign or his local deputy) and the Ta'yyúl" villages in Delhi (the term means "Privy-purse" villages) of the Mughal Emperors, were similar. In many cases, the British Government has granted away or found owners for, these lands. In the Upper Burma Land Regulation, the "Royal Lands" are still reserved (under tenants) to the State (Reg. III. of 1889, secs. 23, 24).

It was also an ancient right, which passed on to the British Government, that certain trees were State property—no matter where found. Familiar instances are "teak" trees in Burma; and "sandal wood" in Southern India. To some extent (and locally), Deodár trees in the Himalaya were "Royal trees." This is independent of the fact that the British Government has reserved to itself the right to the trees (as we shall afterwards notice) in certain waste lands which it otherwise granted away. These Royal trees are still owned by Government; though in most cases, local rules have provided for the subject, and have prevented the right becoming burdensome or interfering with cultivation.

In India there are many rivers which, on leaving their source in the hill country, flow over nearly level alluvial plains; they can hardly be said to have any defined bed; they rise and fall with the melting of the Himalayan snows, or the monsoon rains (or both as the case may be), and alterations of the banks are constant. In this way riparian landholdings are exposed to considerable variation. Three principal forms of change occur: (1) land is washed away in one place and washed up in another against the existing land—thus extending its area (accretion, alluvion and diluvion). (2) The river changes its course, leaves its old bed, and so flows *behind* an estate, *in front* of which it

ormerly ran. In cases where the *main or deep stream* is the (customary) boundary between estates or between native State territory and British territory, an estate may find itself thus transferred from one jurisdiction to another; the land itself being unchanged and remaining recognizable, except where flood has passed over it, destroying the surface. This process has been fancifully called "avulsion," *as if*—for the thing itself is impossible—the river did not change, but the land itself was torn off and floated away with its trees, houses and all intact, over to the other side. (3) The river divides and leaves great islands in the midst, which are not attached to either bank, and therefore cannot be claimed as attached by "accretion" or on the principle of "accession" (p. 69) to the estate on either shore.

The whole subject of the rights arising and altering consequent on these changes, is still governed by a clumsy old Regulation (XI. of 1825) of which the main defect is that it is to be read *subject* to all *local customs*; now these customs are various, and often very inconvenient with reference to modern conditions of life and ownership, whatever they may have once been in the days when they were invented.

I have only alluded to this subject, however, to introduce the fact, that (3) islands, formed under circumstances which do not cause them to be regarded as accretions to either shore (and the estate on it), or as being formed up on the site where a private estate can be proved to have before existed, are the property of Government. In several of the Panjáb rivers, Government owns plantations, either natural or artificial, on such islands.[1] Of course Government (like any private owner) may gain additions of land to any estate, plantation, &c. on the river bank, by accretion of alluvial formation on the principle of "accession."

The general right of Government to minerals—which term includes not only mines but all products below the surface—has been the subject of much discussion. The question has, however, been settled by a despatch from the Secretary of State.[2]

[1] In some places seed borne by the water naturally clothes the islands. In the Panjab (and in Sindh) natural plantations of *Dalbergia Sissoo*, *Tamarix* and *Populus Euphratica* are formed in this way.

[2] No. 35, dated 25th March, 1880.

In England, by the Common Law, all proprietors of land own (as we have seen) everything up to the sky and down to the centre of the earth, except gold and silver mines, which, by prerogative, belong to the Crown. But in India, this English Common Law maxim and prerogative do not apply, at any rate beyond the limits of the Presidency towns. It is also a principle, as we have seen, that under existing rules of international law, conquest does not operate to alter private property in land. If, therefore, it could be shown that under any form of landholding in India, there was such a recognised tenure as by custom included mineral rights, then such rights would belong to the estate. But such a right it is difficult to make out. In the first place, as mineral deposits most frequently exist in hill ranges and other remote places, they will not have come within the limits of recognized estates: and the land being waste, is the property, as we shall see, of the State. But even should the land have an owner, the claim to minerals does not necessarily follow. We have to consider what proprietary right really was, if any existed under the Native law, and what the effect of modern Settlements and recognitions of right in land, has been.[1]

Under the Native law, the right to minerals seems not to have been definitely settled. Under Hindu law, Manu's Institutes lay down the rule, that half the produce of mines belongs to the king: and the Muhammadan law (Hidáyá I, Chap. V) appears to recognise the right of the soil-owner, though the State may impose a tax on the mineral produce. This is vague enough; but the whole subject of property in land under the Native system, was so little defined, that it was necessary for the British Government to confer rights *de novo*. At the present day, wherever the proprietary right is recognised in general terms, it is open to argue that certain rights do or do not form part of the right recognised. But the English Common Law principle is not applicable in India and cannot be invoked, as a matter of course, to show that every one who has a property in the soil, necessarily has mineral rights also.

The following general conclusions, gathered from the despatch of the Government of India in 1879, and approved (with the modifications introduced into the text) by the Home Government in 1880, may be stated with confidence:—

(1) In permanently-settled estates in Bengal, Madras, Oudh

[1] In Madras, it has been held that the raiyats have a virtual property in the land, and it may be asked if this would include mineral rights? I should think not: at any rate in purely raiyatwárí holdings; but the point cannot be regarded as settled till we have a judicial decision. The State has certainly taken a royalty even in the fully-owned "janmi" lands of Malabar.

and elsewhere, the right of the landlord to minerals is admitted; because even if it were open to question (and opinion is not unanimous on this point) it would be impolitic to disallow it.

(2) In non-permanently-settled estates (landlord estates, village-estates and other), where there is no specific provision of the legislature, there is no general rule as to mineral rights. Even in different parts of the same province, the law and facts of the case may be different. When the question arises in each province, it will have to be answered for that province only, in accordance with the practice of Government, and with judicial (or other) precedent. But the Secretary of State has added that, as a general rule, unless there is any distinct judicial precedent, or proof of established law or practice to the contrary, mineral rights must be presumed to belong to the State.[1]

In connection with this, it may be stated that in all the newer provinces, as well as in Bombay, it has been found possible specifically to settle the point. Thus the right of the State to minerals (to a greater or less extent,—the precise words of the law must be referred to) has been declared by law in Bombay,[2] the Panjáb,[3] Ájmer,[4] Central Provinces,[5] Burma,[6] and Assam.[7] In the North-Western Provinces, the matter will have to be settled on the principles just stated; and I believe it is intended at revised Settlements, to introduce clauses in the records which will determine the point, at least as regards new mines. In the alluvial plains, the matter has very little importance; and the only mineral deposits of consequence are in the hills, where reservations in grants of waste land will probably do all that is required.

[1] This seems to be the reasonable conclusion. There may be some general right in land, but we know that it was legally very ill-defined under Native systems. Our Government has desired to concede to the landowners whatever they are equitably entitled to, but it is obvious that Government is the natural owner of all residuary rights that are not shown to vest in the holder of private lands.

[2] Act (B) V of 1879, sec. 69.

[3] Act XVII of 1887, sec. 41.

[4] Regulation II of 1877, sec. 3.

[5] Act XVIII of 1881, sec. 151.

[6] Act II of 1876, sec. 8, and Upper Burma, Reg. III of 1889, sec. 31.

[7] Reg. I of 1886, secs. 6 and 9.

(3) In waste lands, the right to minerals remains with the Government; and it is held that grants of waste which do not specifically include mineral rights, do not convey them; except in the case of those absolute grants spoken of as "fee simple" grants. In all modern leases under the revised rules, a reservation of the Government right to minerals is specifically made.

### *Waste Lands.*

The right of the State to all waste lands not lawfully occupied, nor forming part of recognized estates, is, for Forest officers, the most important head; and a brief historical retrospect is necessary. There can be no doubt that—if we go back to the early Hindu kingdoms, and the palmy days of the Mughal Empire and the Dakhan Muhammadan kingdoms, a right (of some sort, and however undefined) of private persons in cultivated land, was generally recognized. Only the waste and unoccupied land was at the disposal of the Ruler. We do not find, for example, that the laws of Manu (a well-known Hindu text book) or the Muhammadan law books (written long after Manu) ever claimed for the King, Rájá, or Emperor, a right in *all* land, or asserted that he was the only person entitled to be called the owner or landlord. But historical circumstances gradually produced an alteration. Later conquerors developed the natural idea that they became owners of *all land* by their conquest. I cannot go into the whole subject,[1] but briefly state the fact that gradually, the later Hindu or Rájput Sovereigns, chiefs, and princes, and the Muhammadan princes like the Nawáb of Bengal, the Nawáb of Oudh, the Nawáb of Haidarábád, the Sultán of Mysore, all of whom were either conquerors, or had thrown off allegiance to the Mughal Emperor at Delhi and set up as independent,—all of them claimed *to be absolute owners of every acre of the land in their dominions.*

All their subjects who directly cultivated or held the land, were only "raiyat" or dependants ("tenants" as we should call them); they were allowed indeed to hold their cultivated lands on certain terms, and even to enjoy a hereditary right, at least to some extent;

[1] It is more detailed in my "Land Systems of British India" (Vol. I. p. 230).

but the only real private property allowed, was when the king made (in perpetuity) a revenue-free grant of land, or recognized some noble (or official) family as holding a permanent estate. This was generally, the state of things in Bengal, in Oudh and the N. W. Provinces; and probably in the Panjáb, in Madras, and in the Maráthá dominions of Bombay, when the British rule began. A similar claim is actually made at the present day in Haidarábád, in the States of Gwalior and Indore, and generally in all Native States and Chiefships whatsoever.

The British Government legally, *i.e.*, by the usual principle of civilized international law, succeeded to the *de facto* rights of all conquered or ceded States—as they existed in the end of the last century and in the beginning of this,—because they were public rights, established (however arbitrarily) by the unquestioned power of the local Rulers. At the same time the British Government was aware of the impolicy of such a wide claim, and must have been more or less aware[1] that it was a comparatively recent one, and not really consistent either with the old texts, or the practice of the ancient Hindu Rájás, or of great Mughal rulers like Akbar or Jahángír. So that the statements made on the subject in the preamble to Regulations (and the like) are not always very consistent or exact. But I believe I am right in saying that the general intention of Government was to make a beneficial and not a selfish use of the claim; that is to say, it would assert the general State right, only as a convenient basis from which it might proceed to regulate, confirm, or confer, practical, working, proprietary-titles in favour of the various persons equitably entitled thereto. In some cases it declared a formal landlord-title, as in the case of the Zamíndárs of Bengal, the Taluqdárs of Oudh, and the village owners in the North-West. In other cases it conferred a *practical* right, which it did not call "proprietorship" —but a "right of occupancy"—(as under the Bombay law). In Madras again, it recognized the "Zamíndárs" of the northern and western districts (and some similar grantees and landholders in other parts), as formally proprietors under their

[1] I say "more or less" because in early days these matters had not been investigated as they have since been; and some of the early advisers of Government (*e.g.* Mr. James Grant) wrote what is quite untenable historically, on this subject; and so a just view may have been less accessible than it now is.

"sanad" or title deed of perpetual ownership;[1] but about the bulk of "raiyats" or peasant-holders, it declared nothing, at any rate directly. Still these latter have been recognized, by judicial decision, as virtually proprietors of their holdings.[2] So in Assam and in Burma,[3] unless some exceptional provision of the law mentions a proprietor by that name, the cultivators are "land-holders;" but for most practical purposes this is hardly to be distinguished from a proprietary title.

The only right in these privately possessed and occupied lands which Government reserved to itself (besides rights in minerals, water, and other rights, such as have been mentioned) was to secure its land-revenue and regard the land itself as hypothecated as security for due payment (p. 206).

But the important point for us is, (and to this the preceding remarks are designed to lead up) that while the Government thus recognized private ownership (virtual or actual) in 'occupied' land[3] it retained the ancient (and never doubted) right of the State to all land not definitely occupied by permanent land-holders. I have already alluded (in another connection, p. 3) to the very little attention given, in early days, by Government, to this important right; but in 1828 it was definitely asserted in the preamble to Reg. III. that, "*land unowned and unoccupied . . . . or being still waste, belongs to the State.*" The law, as such applies to Bengal, but the principle is quite general.

No doubt Government had deliberately given up a good deal of waste that it might have once claimed. It was always desirous, in erecting Zamíndárí and other proprietary estates, to let them have plenty of room for extension of cultivation; and equally so in the village estates recognized in Northern and Central India and the Panjáb.

In Madras, Bombay, and all "raiyatwárí" countries, it is

[1] Those who care to see the exact legal position of raiyats in Burma, Bombay, and Madras, may consult my "Land Systems of B. India," Vol. III. p. 269ff, and 128ff, respectively.

[2] It is with reference to this that the Madras Forest Act (V. of 1882) as we shall see in another lecture, defines what lands are "at the disposal" of Government.

[3] I prefer to say 'occupied,' because the land might not have been actually under the plough. Government recognised (in all cases of *proprietary* right) an area of land as a whole, forming the estate; it was all (at any rate it was assumed to be) *under occupation as owned, though not* necessarily cultivated.

otherwise; the system there only regards the actual cultivated holdings, and all waste plots remain at the disposal of the Government. The holders however, in those countries, made no claim to any rights in land outside their immediate holdings—except for privileges of user such as grazing.[1] In Malabár, Government allowed the landlords (called "janmí") to include *all* the waste and forest in their holdings. In Kánara, the same process was going on when it was fortunately checked.

Lastly, it may be added that in the Central Provinces, though in the case of Zamíndárí estates, the waste and Forest land has been included in the estates as private property, it is made subject to a certain legal control (Act XVIII of 1881, sec. 124A).

But after all these specific allotments of waste are allowed for, the residue remains the property of the State.

Besides the Reg. III. of 1828 already alluded to, there are numerous other declarations in authoritative documents and Acts, which either express (or directly imply) the Government ownership of the Waste.

For example in North Kánara some years ago, a local proprietor attempted to claim the ownership of the adjacent waste, and was resisted by Government. He based his claim (among other things) on *acts of user*, which, as we shall understand in another lecture, may give rise to easements, but not necessarily to a proprietary title.[2] West, *J.* said that "under British Rule (and he might have added—under every other rule of whatever dynasty) the principle from which we must start is, that waste lands belong to the State."

So too the preamble to the Waste Land Rules of Oudh (1865),[3] though not law, still publicly and authoritatively asserts, as a fact, that "under the Native Government all unassessed waste lands in the province were held to be the property of the State," and that the "right has devolved on the British Government and been recognised and acted on by it since annexation."

The North-West Provinces Land Revenue Act makes a declaration of Government right in all waste not included in any private estate;[4]

[1] In Madras, in certain districts, there were village landholders who claimed peculiar rights as "inamdar;" but that is a detail of tenure-history which I cannot go into, and it does not affect the general fact stated in the text.

[2] See the case *Bhaskarappa Collector of Kánara*, Ind. Law Reports (Bombay Series), Vol. III; 453 esp. p. 5834

[3] Notification of Government of India, May 25th, 1865.

[4] Act XIX of 1873, sec. 58.

the Bombay Code does the same[1] and the Panjáb Act[2] makes, by direct implication, a similar claim. If it is asked why a specific declaration was not repeated in the Act XXIII of 1863, which specially provides for settling "Claims to waste lands," it may be answered that that Act was passed when a large proportion of the provinces had already come under Settlement, so that there was no express occasion to declare it; moreover, as the object of the Act was specially to protect possible rights and claims of private persons over waste from being over-ridden in effecting Government sales and leases of such lands, it was not the place in which to repeat such a declaration.

The right of Government to all waste land not owned or occupied in practically proprietary right, may then be taken as quite beyond dispute.

Not only is the Government the owner of waste lands (not expressly or impliedly allowed to belong to certain estates), but the existence of *rights of user* which may have grown up, does not deprive it of the ownership, though they may burden or limit the exercise of ownership rights.[3]

The detail of the actual orders passed from time to time, for the disposal of Government Waste lands, must be looked for in the revenue Handbooks.[4] I can only briefly mention that it was only in 1861, that the attention of Government was definitely turned to the whole subject of the utilization of Waste Lands; and Lord Canning sent home a minute, in which various measures were proposed. Forest estates were not however as yet thought of. The question was to encourage agriculture, and special cultivation such as tea, coffee and cinchona. At first the rules indicated that the proposal was to *sell* waste lands

[1] See sec. 37 of Bombay Act V of 1879.

[2] Act XVII of 1887, sec. 42; compare also Act IV of 1872, sec. 48. The subject is not mentioned in the Oudh Act, because the question was disposed of, and the waste cut off that was not to belong to the estates settled, before the Revenue Settlement began. So in the Central Provinces; the Act only takes notice (sec. 154) of claims regarding waste land that had been disposed of, to bar them after three years from date of Settlement.

[3] I need hardly insist on the importance of the principle (recognized in the Kanara Case and in Act XXIII of 1863), that you may have a certain *use* of the products of land by grazing, wood-cutting, etc. and so acquire easements, without becoming *owner* by "occupation" (p. 65). To become owner you must have what is, on the face of it, a permanent occupation *as owner*,—not a mere casual use.

[4] I refer of course to the remaining Waste lands,—remaining that is, after all arrangements (already alluded to) for making over convenient areas to extend private estates, were completed.

and that free of any revenue charge. Fortunately for the country, so questionable a policy was only carried out to a limited extent; because capitalists had hardly begun to turn attention to acquiring land for the cultivation of important staples. When it began to be perceived how land was rising in value, and how unwise it was to sacrifice the State rights in the soil, and also the revenue prospects in perpetuity, the policy changed; and now the Waste land is always *leased* for a conveniently long period; it is only after real use of the land has been made by the applicant, and it is evident that he is cultivating it, not merely retaining it as a speculation to sell again, that the lease-right may be ultimately converted into ownership, and that subject to a suitable Land Revenue assessment. "Rules for the Lease of Waste Lands"—made by executive authority (for no other is needed)—now exist for all provinces. They have been often revised, and therefore in some provinces (*e.g.* Bengal and Assam) it is found that estates are held, some under the old rules and some under the later ones. All these rules *now* provide the lands are not available for lease, until the Government Forest Department has had the opportunity of advising as to the desirability of keeping the land for Forest purposes.

I may here mention a point which could not conveniently be introduced before; that in BENGAL, the waste not included in estates, is found mostly in the remoter districts where there were no great Zamindárs to whose estates it *could* belong; such as the hills about Darjiling, in the eastern districts, and in the Sundarbans at the mouth of the Hughli river. In the NORTH WEST PROVINCES, all Waste adjacent to villages in the open country, was given up to them.[1] Only in the districts in, or verging on, the Himalaya, or again in Bundelkhand (Jhánsi, Mirzapur, &c.) are there any considerable tracts of uninhabited Forest land which remain to Government. But in the PANJÁB and in the CENTRAL PROVINCES where village estates are also acknowledged, it was impossible that all the great area of adjacent waste could be given over to the estates; so local rules were made, under which a certain portion (usually twice

[1] I am speaking generally, in some localities the matter was for some time left unsettled. This was the case in the Dehra Dun district, for example.

the amount of the cultivated land—or something of the kind) was included as part of the village, and the rest was cut off and separately shown on the map, as Government waste (in the Panjáb called "rakh").[1]

In both provinces last named, the surplus waste, if wooded, was more or less recognized as Government forest land; but as village cultivation extended, it has often been found, either that the allotment of waste, as originally made, was not satisfactory; so that at any rate the *use* of the waste had better be assigned to the villages; in some cases the land is not really adapted for forest purposes, and is better suited for cultivation by lessees. A great deal of such land therefore remains as "District Forest" or under some similar designation, not under Forest law, but still distinctly Government property.

It may be added that in provinces like Madras and Bombay, where the tenure of the villages did not admit of areas of "waste" being absolutely made over to them, provision was usually made for setting apart waste lands to be used for grazing and wood cutting; so that even there, it is chiefly in mountain ranges and less inhabited parts of the country that there are large areas of forest and waste land, subjected to more or less regular Forest Conservancy. Of late years there has been a tendency to subject these village lands also to some kind of conservation, which is eminently desirable.

After making all allowances for such cases as are above alluded to, there are still very large areas of timber- and other forest, and there is no doubt about keeping some (at least) of it as permanent forest. But so large is the total available wooded area, that much of it must ultimately pass under the plough, or be used in other ways. This subject however cannot be dealt with till we come to speak of the positive provisions of the Forest Acts.

One other matter regarding the general condition of the

[1] In the Panjáb this matter long remained unsettled in the districts (containing hill forest or lower hill jungle) like Kángra, Jhlam and Rawalpindí.

In the province of Ajmer, acting on the Settlement system of the North West Provinces, *all* the waste was given up and divided among the villages (who really had no claim to it). Afterwards this was regretted, and the Ajmer Regulation (VI of 1874) provided for the recovery of control over suitable areas of waste to be formed into permanent Forests—so essential, in that precarious climate, not only for preserving the soil, but to yield fodder in times of famine or drought.

Government waste lands, must here receive only a preliminary notice; it will again come before us in another connection. The result of the long-continued neglect of the waste areas, and the uncertainty in which the question of their retention or abandonment remained in some districts, was, that the adjacent villages (to say nothing of the ruder tribes living in the forest) were allowed to make unrestricted use of the waste lands, and so (gradually) fixed practices of grazing, wood-cutting, &c., grew up; and when ultimately it was determined to form these waste lands into Forest-Estates, or to sell or lease them for other purposes, more or less difficult questions arose about what had come to be considered as *rights* of grazing, wood-cutting, and the like.

I shall hereafter explain (Lecture XVIII) how the Forest law deals with the subject; but here it is convenient to mention that before a Forest law was thought of at all, an Act was passed (XXIII of 1863) for the disposal of all claims in or over waste lands, whenever it was necessary to have such questions determined in consequence of a proposal to lease or sell the land. The Act is very badly worded, and the machinery for settling the claims, so cumbrous and impracticable, that I have never heard of any use being made of it.

The subject of waste lands has taken up so much of our time, that we shall be in some danger of forgetting the other heads of Government property to which we must now direct a brief attention.

## (II.) Public Property in Roads, Waterways, &c.

It will be desirable next, briefly to notice the right of ownership in lands occupied by canals and other public works, by railways and public roads.[1]

Railways made and worked by Companies are owned by the Company; but the land may have been acquired by public authority under the Land Acquisition Act; and in that case

[1] The Bombay Code (Act V of 1879, sec. 37) specifically declares that all public roads, lanes, paths and bridges, ditches, dykes, fences on or beside the same, the bed of the sea, and of harbours and creeks below high water mark (i.e., the highest point of ordinary spring-tide at any season of the year), the beds of rivers, streams, nálas, lakes, tanks, canals, water courses, and all standing and flowing water, and *all lands* wherever situated which *are not the property of individuals*, or aggregates of persons legally capable of holding property, are the property of

there is a special agreement between Government and the Company as to the terms of holding.[1] This agreement secures, with the force of law, the terms on which the public will be entitled to use the railway or other works.

Public roads are distinguished from mere rights of way which one man (or several, or a community) may possess over private property. The enjoyment of the use of a public road is a right which belongs to the public at large. The road itself belongs to Government, as is clear from the general law. I pass over the technical question as to whether the possession of the Government on behalf of the public is not "adverse" and so becomes prescriptive in the course of years; and here merely observe that Government exercises, by legislation, a right to regulate the use of all such public ways. It enacts Railway Acts[2] and laws for levying tolls on roads.[3] Many roads are old Imperial lines, which have been public property for generations past; and whenever a new road or State Railway is made, the land is acquired by public authority and paid for out of public revenues, so that no possible question can arise about it. I may also mention that it is a well-known principle of law as establishing the State ownership of public roads, that *no private individual* can bring a suit to remove an unauthorised obstruction, even though he own land on both sides of the road; unless, indeed, he can show some special damage to himself over and above the general inconvenience.[4] The obstruction can only be dealt with by the public power, *i.e.*, by the Magistrates.

Bridges constructed at the public expense over rivers, &c., are evidently part of the road and governed by the same principle.

The beds of canals and their inspection roads, spoil banks, &c., are all on land which was either Government property under the former Native rulers, or has been expressly acquired in our

Government, and may be disposed of by Government officers, subject to rights of-way and other rights (not being property rights) subsisting on it.

[1] Act X of 1870, sec. 49. The agreement has to be published in the *Gazette of India* and in the local *Gazette*.

[2] Act IX of 1890

[3] Acts VIII of 1851 and XV of 1864

[4] See Civil Case No. 72, "Panjáb Record," 1877. The whole question has been exhaustively examined, and all English and other authorities reviewed, in *Sathu* v. *Ibrahim Aga*, I. L. R. Bombay series, II, 457.

own times. The preamble to the present North Indian Canal Act (VIII of 1873)[1] therefore contents itself with asserting the right of Government to use and control *the water* of all rivers and streams flowing in natural channels, and of all lakes and natural collections of still water. The power to remove obstructions in rivers is also declared by Act VIII of 1873. *Navigation* is also provided for, and tolls on rivers are levied by public authority (*e.g.*, Act I of 1867, North-West Provinces). *Ferries*, when they are of a public nature, and not merely crossing-places used by individuals or the inhabitants of a village, are also regulated by public law.[2] Government, under the Forest law, also asserts the right of control of rivers and their banks, or so far as concerns the transport of timber.

### (III.) Property acquired under the Law for the acquisition of Land for Public Purposes.

It is a general maxim that private right has to give way where the public welfare demands it; but under any ordinary circumstances, if the public welfare demands that private property be converted to a public use, a fair and full compensation must be given (pp. 75, 6).

It is necessary that this subject should be dealt with by law, *first*, because we want it to be settled what *is* a "public purpose" and who is to be the judge of the necessity for acquiring the land; and next, because when the question of compensation comes up, there are various interests requiring to be kept in due restraint. For instance, there is the temptation to the owner to put an extravagant price on his property; and the probable inclination on the part of the jury or arbitrators, to be over-liberal in awarding payment which will come out of the Government treasury; whereas in truth, as the money paid comes out of the public pocket, it is the more particularly necessary to see that while the owner is fairly treated, the public is not overcharged.

Again, in connection with the grant of compensation, arises

[1] See also Bengal Act VI of 1876, and Canal Acts of Bombay and Madras.

[2] See Act XVII of 1878 for Northern India, Regulation VI of 1819, and Bengal Act I of 1866; Bombay Act VII of 1879; Act II of 1873 for Burma; Madras Act I of 1873.

the important question, what *is* a fair amount? what circumstances giving value to the property, ought to be taken into consideration, and what excluded? I may have a private garden, which I would not sell for ten times its market value; am I to be allowed anything for the loss as it affects my feelings, or am I only to get the market value? Lastly, what is the best procedure to adopt for hearing and deciding claims? These and such like matters are, therefore, settled in all civilised countries, by law. In India they are now provided for by the Act X of 1870, "The Land Acquisition Act." It is of general application, and is extended to Berar.[1]

The term "land," it is to be borne in mind, includes benefits to arise out of land and things attached to the earth or permanently fastened to anything attached to the earth. It must, therefore, include houses,[2] rights of occupancy in land, rights to a water-course, to pasture, and to jungle produce, &c., &c.

By sec. 4, the Local Government may issue a notification that certain land is *likely* to be required. When the notification is published, power is given to the proper officer, to examine the place, survey, dig or bore into the soil, and do all other acts necessary to ascertain whether the land is adapted for the purpose. He may place marks to indicate boundaries, levels, &c., and if *necessary*, he may cut crops or clear away jungle. But compensation for such preliminary acts has to be made.

When it is determined that land *is* required either for Government or for a Company (registered in India or constituted by Act of Parliament or Letters Patent), a declaration to that effect is made by Government under the signature of a Secretary or some officer authorised to certify the orders of Government. The declaration, when made according to law, is conclusive proof of the public necessity, and that the purpose is a public one.[3] The declaration has to be published in the Official Gazette, and must state the district or other territorial division in which the land is situate, the purpose for which it is needed, its approximate area, and, when a

[1] Notification of 4th July 1870. Note to Legislative Department edition of the General Acts.

[2] The Act requires that if a house, building, factory, &c., be taken, it must all be taken if the owner so requires—not merely a part (see sec. 55). The Act only applies to land and things on it, for the occasion can really never arise that Government should require to take people's moveable property.

[3] The Forest Act VII of 1878 expressly declares that if land is wanted for a

plan has been made of the land, the place where such plan may be inspected.

The Local Government may now proceed to acquire the land. The Collector is the official who takes order for acquiring it.

Public notice[1] is given at convenient places on or near the land, that it is about to be taken possession of, and that claims to compensation should be sent in to the Collector. On the day fixed, the Collector takes the claims into consideration.

He first makes a summary enquiry, so as to fix what appears a reasonable compensation; this he tenders. If the parties attend and agree to the Collector's proposal, the latter makes an "award" accordingly, and there is an end to the question of compensation: otherwise[2] the matter has to be referred to "the Court"[3] for determination.

Two assessors, one chosen by the Collector, the other by the interested persons, are to be appointed to aid the Judge in deciding the compensation.

The Act prescribes what points are to be taken into consideration in awarding compensation, and what are not.[4]

Generally speaking, all direct loss that is caused by taking away the land from the owner's other property, is compensated, as well as the loss of the land itself. Among things *not* compensated, are improvements purposely made with a view to claiming an excessive price, and the "fancy value" or *pretium affectionis* which an owner may be disposed to put on his land beyond its market value.[5]

In fixing compensation, it can never be *more* than what is claimed, or *less* than what is offered by the Collector on behalf

timber depôt, a plantation, or for any of the purposes of the Act, this is to be deemed a public purpose (sec. 83). Such a declaration is, perhaps, hardly necessary, since the Land Acquisition Act itself makes the declaration of Government that the land *is* wanted for a *public purpose*, final: so that if Government were to judge that any purpose whatever was a public purpose, and to make the declaration accordingly, there would be no calling the declaration in question (sec. 6). Where land is wanted for a *Company*, there are certain conditions to be fulfilled, for which the Act must be referred to.

[1] Sec. 7.

[2] For details as to the precise circumstances, see the Act itself.

[3] The "Court" is, in all Regulation Provinces, and also in Lower Burma and Sindh, the principal Civil Court of original jurisdiction, and in the Non-Regulation Provinces (other than Burma and Sindh) the Commissioner's Court, by definition in sec. 3.

[4] Secs. 24, 25.

[5] The *disinclination*, though not allowed as an item *in the valuation*, is practically allowed for afterwards, since, by sec. 42, the Collector pays an additional 15 per cent. on the amount awarded, in consideration of the compulsory nature of the transaction.

of Government;[1] unless, indeed, the person has, without reason (of which the Court is to judge), refused or omitted to make a claim; then the amount may be less than the Collector's tender, and of course cannot exceed it.

If the Court and one or both of the assessors, agree as to compensation, there is an end of the matter.

If the Court differs from both the assessors (whether they agree with each other or not[2]) the Judge's opinion prevails; but there is an appeal on the part of either the Collector or the claimant to what is (rather curiously) called the "District Judge." I say curiously, because in Regulation Provinces, the Court is itself that of the District Judge, and the appeal would lie to the *Civil Judge* (of the Division). In the other Provinces, where the "Court" is that of the Commissioner or Divisional Judge (except in Burma and Sindh, where it is the District Court) the appeal would lie to the High Court.[3]

In any case, if the proposed award exceeds Rs. 5,000, the appeal is to the High Court. Speaking generally, the Civil Procedure Code governs the proceedings.[4]

There is no other way of contesting an award than the appeal just mentioned; and a civil suit cannot be brought to set it aside.[5]

There must be no delay in paying, after possession is taken, or interest at 6 per cent. begins to run.[6]

It is also practically important to public officers, to observe the difference between taking up the land they require by *consent* or private *agreement*, and by operation of the Act. In the latter case they get the land on an absolutely clear title and free of all incumbrances.[7] In the former, they take it with its incumbrances; so that, although taking by private agreement saves a good deal of trouble, this method should only be adopted when there is *no risk of any defect* in the title, or of there being any incumbrance.

All the provinces have local rules (in Circular Orders issued by the Board of Revenue, the Financial Commissioner, or other Chief Controlling Revenue authority). These prescribe the form

[1] Sec. 26.
[2] Sec. 30, see note to Legislative Department edition of the Act (General Acts, Vol. 2, p. 1234).
[3] Or the Chief Court of the Panjáb.
[4] Sec. 36.
[5] Sec. 58. As to *costs* the Act itself must be consulted.
[6] See sec. 42. Of course if there is an appeal, the time for that must expire first.
[7] Sec. 16.

in which public officers must report to Government when they require to take up land, and the details necessary to be submitted. Every officer will therefore refer to his provincial Circular (as well as to the Act itself) for practical guidance in any actual case. There is often much work for the Collector to do (sometimes requiring the services of a special officer) not only in awarding compensation, but in determining the deduction from the revenue-roll which has to be made consequent on the expropriation of the land.

This brief account is only designed to familiarize the student with the principle that the public necessity may override private property rights, and to tell him the main outlines of the procedure by which compensation is awarded, and disputes regarding the amount of it settled.

# LECTURE XVI.

## THE SEVERAL CLASSES OF FOREST CONSTITUTED; AND LANDS MADE SUBJECT TO THE PROVISIONS OF THE FOREST LAW.

THE last Lecture may perhaps have seemed to lead us away from the direct subject of Forest law; but it was necessary, not only to explain how the State became owner of waste lands, forests and jungles, but also to describe what other properties Government possesses, and in particular to notice the law under which Government can acquire, for public purposes, such property as it declares to be so required. This latter subject indeed is specially mentioned in the Forest Act; for Government sometimes expropriates parcels of land in order to complete and consolidate Forest areas. At any rate this examination of the origin of Government property in general, has put us in a position to understand the broad statement, that *the right of Government to all uncultivated, unappropriated land is the basis on which the Indian Forest Law proceeds.* We have now to go a step further, and take note of the fact that the waste land available for Forest purposes was not found in a uniform condition; it had been so long neglected, that the rights of Government had not always remained intact; and more especially, numerous rights of user or easement had grown up. Consequently the Forest law had to be prepared with provisions which would meet the different states or stages in which the lands it dealt with, were found. Not only so, but the law had (on grounds of convenience) to contemplate certain differences in the treatment of areas which, legally speaking, were on the same footing as regards rights. It had also to take some notice of Forests which were not State or Public Forests. In short, the Forest law deals with *several classes or kinds of Forest Estates;* and we must proceed to examine what these are.

While speaking in the last Lecture of the Government right in the waste, I indicated the fact that for many years "the waste"

had remained quite uncared for; and that a still longer time elapsed before Government thought of utilizing it on the large scale for Forest purposes. The consequences of this delay were, that the inhabitants of the villages (some of which were ancient, others of later growth) became accustomed to go into the neighbouring waste, and to graze in it, cut wood and even break up plots for tillage, without the slightest notice or interference. These customary enjoyments continued for many years,[1] and were very convenient, if not actually indispensable, to the villagers; in the course of time they were held (as I shall hereafter explain) to constitute what are, practically, 'prescriptive rights,' (p. 87). Hence, when the State came to exercise its right in the waste for (public) Forest purposes, it was found that the land was, in many cases, no longer a free property, but was burdened with various opposing rights and claims. Not only so, but in some cases, special arrangements made at land-revenue settlements, had created another modification: the right in the soil itself was found to have been granted away, and only certain produce-rights retained for Government.

For example, in the Kángra valley (a submontane Panjab district), the action of the first Settlement authorities resulted in this, that the waste and Forest was all given over to the village estates, not entirely (as was so generally done in the N.W. Provinces) but partly, the right to the trees and the use of the soil for tree-growing (as long as trees grew or *could be produced*), was retained to the State.

There are also other more or less exceptional cases in which Government has now only partial rights in certain lands. For example, there are cases in which, owing to the law of escheat (p. 205) and sometimes by agreement, the State has become possessed of a *share* in a Forest, or some other limited interest in it. These limited rights and interests may nevertheless be such as give the State a *locus standi* for undertaking at least the working control of the Forests.

When therefore the Forest Acts had to open their subject *by describing in general terms what lands the Government could proceed to take in hand or deal with, with a view to Forest Conservancy*, it was not enough to refer to "all unoccupied waste

[1] In the case of many of the older villages, they had gone on for generations.

land;" it was desirable to embody in legal phraseology, the result of the various stages and conditions above alluded to. These conditions may be summed up by saying, that the land is:—

(1) Either the property of Government alone, or held in shares with other co-owners (whether burdened by rights of easement or not).

(2) The Government right only extends to the growing produce or part of it.

Hence sec. 3 of the Indian Forest Act (VII. of 1878) provides that—

**"The Local Government may from time to time constitute any Forest or waste land which is the property of Government or over which the Government has proprietary rights, or to the whole or any part of the forest produce of which the Government is entitled, a Reserved Forest in the manner hereinafter provided."** (The same words apply also to "Protected" Forests.)

In the BURMA Act it was found possible to express the same idea in a simpler way: the words used are "any land at the disposal of Government." This term is defined (in the Act) to mean any land to which, under the Local Land Law (Act II. of 1876), "no one has acquired the title of landholder, and to which no one has a right by lease or grant from Government." There were no cases in Burma in which Government held only the produce-right, or only a share in the property.

So in MADRAS. This Presidency is, speaking generally, a country where there are a certain (not inconsiderable) number of large (and moderate-sized) landlord estates (Zamíndáris, *polliams*, &c.), and in these the Forest belongs to the landlords. The rest of the Presidency is held (in village groups) by landholders, each having his own holding (raiyatwári, as it is called); and the waste all belongs to Government, whether or not villagers are allowed to use it for grazing, &c. So the Madras Forest Act (V. of 1882) also speaks "of land at the disposal of Government," which is declared to mean "land not already held by any landholder, as defined in Madras Act VIII. of 1865" (an Act for realizing the land revenue).

Land is defined to be "held by a landholder" when it is held as—

(1) Zamindari (with a title-deed of perpetual ownership); or,

(2) Under a grant of ownership of any kind,
(3) Under certain special revenue-farming arrangements,
(4) Paying revenue as ordinary raiyatwári land, or held in a similar manner and shown on the Government register.

This preliminary declaration of the Acts, it will be observed, does not give Government any right it did not otherwise possess; nor does it deprive any one else of whatever right he may legally possess; for the law goes on immediately to require that a notice of the *proposal to make* a Reserved or other Forest shall be published, inviting any one who has any kind of claim to put it forward (sec. 4). It will then very soon appear whether Government can proceed with the further steps necessary, or whether the position of affairs, or the nature and extent of claims, is such that Government will abandon its proposal [1]

So much for the general description of the condition of the lands available to form Forests. We have further to notice, that the Indian Act contemplates more than one form of (legal) Forest; it speaks, in fact, of two kinds of State or Public Forests. But besides that, it contemplates Village Forests; and also makes provision for certain cases in which Government has only a certain share or interest in Forest lands. It also contemplates a limited control over Private Forests, which can only be exercised under certain conditions.

The following is an abstract of the classes of Forest which the Act contemplates—giving first those under the Indian Act (A), and then those under the Burma and Madras Acts (B) :—

(A) (1) The first is the State Forest regularly constituted, which the Act, in deference to usage—but not very conveniently—calls "Reserved" Forest. I distinguish these as State

[1] At the time when the law was under discussion, some people were found to object that these sections entitled Government to 'constitute as "Reserved Forest," *i e*, to serve on and place under Forest law, land in which it might merely have the right to a part of the produce and nothing else.' But the sec 3 read with sec 4, obviously does not entitle Government to do anything beyond notifying a proposal It was therefore necessary to state in sufficiently wide terms, the sphere of possible operation In the extreme case quoted, if the notice were issued and the examination of claims commenced, as the law requires, it would be found that private rights were so extensive (and the State rights so limited), that it would be impossible to comply with the subsequent provisions of the Act therefore the private rights would be absolutely secure Government would give up the attempt, unless it were so important to secure the Forest, that it was worth while to incur the cost of expropriating the whole It is perhaps to be regretted that, by a slight modification of the wording (which could easily have been made), this opportunity for objection was not forestalled.

Forests *par excellence*, because they alone are properly and fully secured: *i.e.*, all the essentials of Forest constitution are observed; the boundaries are legally and strictly determined and demarcated on the ground; all rights (of every kind) are inquired into, recorded and authoritatively defined and provided for, in a manner to be presently described; all other rights not recorded, are declared extinguished; and no new rights are allowed to grow up by prescription.

(2) The second class consists of what are called "Protected Forests," which are also made out of the same kind of lands as the "Reserved" Forests (sec. 3): they are however only provided for as regards the settlement of rights, in an imperfect manner (of which presently).

[No interference is contemplated with waste lands that are not made either Reserved or Protected Forest; but it should be remembered that a large area remains as "District" Forest, and what not (p. 217). This area is *not under the Act*, though of course capable of a certain protection against encroachment and unlawful occupation, under the Land Laws and the general law of property; and it remains the property of Government.]

(3) The Act contemplates the formation of "Village" Forests which, as the provisions now stand, are only Forests of the first class (above), assigned on certain terms, for the benefit of the village.

(4) The Act provides for the control of forests in which Government is interested along with private persons (*forêts indivises* of the French law).

(5) The Act contemplates the protection of *trees* belonging to Government on private lands (see p. 207, as to Royal trees).

(6) And a certain control over Private Forests and waste lands, in special cases only.

(B) The Burma and Madras Acts are different.

(1.) They acknowledged the State or Reserved Forests (with the above-noted characteristics) as the only class of State Forests (fully owned by the Government).

(2) The Burma Act contemplates the formation of Village Forests *directly*,—out of available Government waste or forest land. The Madras Act does not contemplate "Village" Forests at all.

(3) Both Acts contemplate extending a general protection by means of rules (for utilization of produce and general safety of the area) for all waste and forest lands at the disposal of Government, which are not formally constituted Forest Estates.

The other heads are also provided for as usual; but Private Forests do not exist in Burma, and are therefore not mentioned in the Act for that province.

### (1 & 2.) "*Reserved*" *and* "*Protected*" *Forests.*

I must now devote some few paragraphs to explaining how the Indian distinction of "Protected" and "Reserved" (State) Forests arose.

I must first call your attention to a principle fully acknowledged in Europe, and not, as far as I am aware, ever questioned by any experienced Forest officer: that in all cases *where rights of user exist*, and where, if they do not, the policy of Government causes a liberal grant of "*licences*" or "*concessions*" for the convenience of villagers, it is absolutely essential to secure the continued and prosperous enjoyment of these rights or concessions —if for no other purpose—that the Forest should be properly cared for and be under legal protection. And this proper care involves the existence of conditions already indicated, viz.:—

(1) Clear and defined boundaries—

(2) A settlement of rights—an authoritative decision, that is —as to exactly (or as exactly as circumstances permit) what rights have to be exercised and to what extent; and—

(3) A prohibition against all unauthorised diminution of area; and abuse of the soil and growth; as well as against the gradual growth of new prescriptive rights.

It may be said without any qualification, that any forest really permanently wanted—any forest which is expected to go on (in a healthy and successful condition for generations to come)

supplying *any class of material*, whether it be teak, sâl, or deodar trees, for public works and railways, or (no less) small timber, fuel, grass, and other requirements of villagers—must have these operations carried out in it.

It is inconsistent with all experience to assert that forests required chiefly for the ordinary grazing and wood-cutting of villagers, need no care, no settlement of rights, and no closing and no regular plan of working (however simple and untechnical).

It is quite true that *degrees* of cultivation may vary. Valuable forests of "gigantic teak trees" may require a higher degree of cultivation than others; but it is not true that other forests can go uncared for and with no restriction on their use.

Demarcation and settlement of rights, are not luxuries, to be applied only to valuable forests destined to one kind of high class production: they are essentials. There is not the least doubt that, *in the process of time, every forest area* (whether called "Protected Forest" or not) *in which various undetermined rights of user exist, and in which the matters above specified are not arranged, will, in time, disappear off the face of the country.* It may take a century to do it, but the deterioration, and ultimately complete destruction, of such places, is as certain as anything can be.[1]

The original framers of the Forest Bill or Draft Act, while not doubting this general truth (based as it is on scientific grounds, and illustrated as it has been in the past by painful experience), were nevertheless aware that, in India, it was not possible to apply a *perfect Forest organisation* to every acre of land that was available as Government waste or Forest land,—even to all that was fully available. In the first place, we have no *data* for determining that Indian provinces require 17 per cent., or 10 per cent., or any other proportion, of forest to other land; we have to look to the practical possibility of action with reference to the time, money, and strength of working staff available, as well as to local conditions. In the next place, it is always an economic question, how far *forest* is better (in a given locality) than *cultivation*. It may be the nature of the soil

[1] Unsettled and vague claims are always found to grow and grow with the lapse of time, till a fair settlement becomes impossible then the whole area is given up in despair, and of course (being left to itself) gets worse and worse, till neither grass nor wood remains.

(suited for trees, but not for corn or rice), or the situation (hill-country tracts removed from the general lines of agricultural export, or thinly inhabited), determine in favour of forest. But in Indian districts, large areas of existing "jungle" or Forest land are also perfectly cultivable. Therefore, under the circumstances, it is wiser to *secure first*, those tracts which a careful inspection shows to be obviously valuable as forest, and to be capable of profitable working, or likely to be so in the near future; and to leave the areas about which it is uncertain what the future will declare. Conditions must there be allowed to develope. The construction of a railway, the discovery of coal, and such like events, will often produce an entire change in the economic position; and then it may be found that the greater part of the "jungle" had much better be turned into fields; it would accordingly be folly to apply an expensive or troublesome procedure of demarcation and settlement, which might in a few years' time (or at some future time) require to be cancelled.

Under such circumstances it was considered best to propose the application of a *regular Forest procedure* of complete demarcation and settlement, to the area which (on a review of existing conditions and probable future requirements) it appeared *certainly* desirable to retain,—whether for growing timber for the market and for public works, or (equally) for the supply of grazing and wood for the every-day wants of the population. Those areas it was proposed should be the "State" Forests (or "Reserved" Forests) under regular departmental control.

On the other hand, it would have been very unwise, at once and entirely to give up, and throw open to cultivation, or to abusive grazing and woodcutting, all the lands that could not at once be decided on as suitable to form "Reserved Forest." Some of them might afterwards prove to be wanted as permanent forest.

Moreover it was contemplated that, as time went on and the importance of well-managed Forests was better appreciated *by the people* a desire would grow up, to have *real* "Village" Forests—not merely tracts of waste given over to the village owners, (for grazing and wood-cutting indeed) but wholly free to them to partition and plough up if they preferred it,—but tracts to be kept (under a limited State supervision and control) as *Forests*, whether coppice, or coppice

with standards, or as mixed grazing and woodland, or in any other form of forest.

Hence, the original proposal was to extend to these jungle tracts and forests, such a limited protection as would be sufficient to save them from being cleared away and devastated, at any rate for the years during which conditions were developing themselves. It was judged sufficient for this purpose :—

(*a*) To provide a general and inexpensive demarcation ;
(*b*) To prohibit the conversion of the forest into cultivated land ; except on special permission ;
(*c*) To reserve a limited class of valuable trees, to which no one would have a right ;
(*d*) To periodically close portions of the area that might need it ; and—
(*e*) Generally, to provide for the making of simple rules which would only aim at preventing any *abusive* acts and would facilitate orderly working generally.

Under such restrictions, it was not intended (nor was it thought in any way desirable) to interfere with existing equitable rights of user ; consequently it was not proposed to enquire into, define, or record, them. If right were pleaded as a defence when any Forest officer objected to an act as contrary to the rules, it was intended that this should be entirely sufficient. For obviously the plea of right could not be set up against a prosecution for a destructive act or an abuse of the Forest :— rights are always to use, not to abuse.

It might indeed be theoretically an advantage to have *all* rights over *all* waste land in India, settled ; but it would be impracticable, owing to the cost, and demand for time.

Unfortunately, however, when these ideas as embodied in the Draft were submitted to the Legislature, they did not find acceptance.

At first probably it was feared, that over-zealous Forest officers might ignore rights, if they were not recorded ; and that in any case disputes might occur and prosecutions be started, which would never have been begun if the *right was known ;* and so forth.

Consequently a provision was added in the Act as passed, to

the effect that the area might be made "Protected Forest," only after forest rights had been recorded At the same time it was felt that, if any regular provision for *enquiry and decision* as to such rights were made, it would be necessary to provide for special officers, and for an appeal and so forth, in which case there would be virtually no difference between the "Reserved Forest" of Chapter II and the "Protected Forest' of Chapter IV. And so only the existing general provisos on the subject (sec sec 28) were added [1]

That is briefly the history of the provisions of Act VII of 1878 about the separate class of "Protected" Forests, which, as the Act stands, legally speaking constitute a separate *class of forests* They are however *imperfectly* organized, and, as I shall presently point out, the provision made for the record of rights in these forests, cannot be made sufficient for real forest purposes [2]

As regards the Indian Act then, Government waste lands may be made into either "Reserved" or "Protected" Forests. As the Act stands, Chapter II prescribes the procedure to be followed where regularly "Reserved" (or State) Forests are to be made, and Chapter IV where a less complete procedure is supposed to be sufficient for "Protected" Forests The Act does not contain the slightest indication that one or the other is preferable.[3] Nor is there any question of interpretation. It is solely a matter of policy and of the orders of Government, which procedure shall be adopted Fortunately, the Government of India has never endorsed the idea that Chapter IV. should be the one generally applied, and therefore it has, in practice, been made use of

[1] In the debate in Council as reported in the *Gazette*, it appears that a new argument was put forward It was suggested that the procedure for Protected Forests would be found sufficient for the great bulk of Forests—those wanted for the supply of ordinary material to the population and that the procedure of Chapter II would only be exceptionally needed for very valuable Forests growing large timber This view however, has never been adopted by the Government of India It itself it is absolutely fallacious (p 231), and simply shows the effects of the half acknowledged belief, against which I have warned you, that forests whose chief object is to yield grazing and small wood for the people, need no settlement nor any special management, but will go on for ever supplying this humble class of materials

[2] It was not intended to be the object was to secure at least the principal rights, against any (possible) encroachment of the Forest officers, not at all to secure the estate or facilitate Forest Conservancy It was supposed that the *Rules* would do all that was needed in that direction

[3] Nor of course does the mere order, Chapter II coming before Chapter IV, in itself indicate any preference

chiefly where there were difficulties in the way of carrying out a better procedure, or where there were so few rights (or none at all) that no serious question was likely to arise.

It will be the duty of well-educated Foresters to bring all their skill to bear against the employment of Chapter IV. *when* it is clear that rights of user are claimed, and that a *permanent regular* forest is wanted.

For there is this danger, that, when, in any case, officials fear the expenditure of time and money or the complication of interests that may exist, they may be tempted to resort to Chapter IV. instead of proceeding under Chapter II. This, in the end, would be poor policy; because if there are numerous demands (in the shape of rights) on the Forest in any locality, it is an indication that Forest is *very much wanted*, and therefore that its preservation and increased productiveness are of great importance *for the satisfaction* of the wants of local right-holders. To put the Forest on an unstable or unsatisfactory footing in such a case, is the surest way (in the long run) to cause ultimate injury to the rights, because the Forest will in time cease to satisfy them. This is only doubtful to those (if such still exist) who do not believe in the necessity of Forest Conservancy.

I do not doubt myself, that those responsible for sec. 28 as it stands, always contemplated some record which would *not* go into any vexed questions, but was by them regarded as sufficient, without such power. But it has of late years been attempted to maintain that under Chapter IV., a tolerably practical settlement can be made. It is advisable therefore to state briefly, why this is not the case. All minor difficulties may be ignored; and it may be conceded (at any rate for the argument) that an officer might be appointed under the Act to make an enquiry into rights;[1] still he would have no power to *decide* about—that is to say to define—the rights. In nine cases out of ten, rights in Indian Forests are claimed in the vaguest and most general terms, and the really important duty of the enquiring officer is to bring the vague rights into a definite form, and that authoritatively: he must settle (for example) what sort and what

[1] The officer appointed generally to record rights (see the definition clause *s.v.* "Forest Officer") would be appointed to exercise certain functions under the Act, and therefore be (legally) a "Forest Officer." The Act supposes also that an enquiry and record may have already been made at a Land Revenue Settlement or Survey; but in practice this is rarely if ever the case, and if rights are mentioned at all in Settlement records, they will be sure to be *undefined* rights.

I take this opportunity of mentioning that under sec. 71 (India Act), a Forest Officer can be empowered to summon witnesses, &c., and take evidence; but cannot be vested with power to hear argument, *decide* claims, or do anything in the nature of authoritatively defining or determining the limits of rights.

number of cattle are to be grazed, and the like. No one who has had the slightest practical acquaintance with the work of settling rights, will doubt, that fixing their limits and their reasonable mode of exercise, is *the* essential work: merely to record vague or general claims is of very little use, as far as the safety of the forest is concerned; and very little advantage to the right-holder.

In short, what is wanted is a power of equitable *decision;* but it requires an authority given by law to pronounce such a decision; and obviously it is further desirable that there should be an *appeal* when either the right-holder is not satisfied, or when the person appearing on behalf of the Forest, thinks that some excessive or ill-founded right has been declared. This authority could not, I submit, under any fair reading of the Act, be created or conferred merely by a Rule made under sec. 75 (see p. 193). When it is added, that the Act does not make any provision for requiring claimants to come forward; or for the extinction of rights which, after due effort to find them out, are not brought to record; when it contains no prohibition against the growth of new rights;—and no prohibition to the sale or barter of produce obtained by exercising the rights, or even of the sale of the right itself; it will be obvious (without going into several other matters of minor difficulty) that rights can never be satisfactorily and permanently settled under Chapter IV. Indeed, as I have already said, though the provisions may secure certain *rights*, they do nothing to secure the *Forest*; and were not intended to do so.

There are, however, circumstances under which it may be advisable to constitute "Protected" Forest instead of regular Forest, and these are:—

(1) As a measure adopted in the uncertainty whether permanent Forest will be required, or whether it will not be better at a future time, to give up the area to the plough or to the tea or coffee planter.

(2) As a measure adopted when the right of Government is imperfect; or when altogether, the legal or other local conditions are such that the practical difficulty of applying the procedure of Chapter II. would be too great; and it is better to adopt Chapter IV. than to do nothing.

(3) It would suffice in cases where it is known that the rights claimable are few or simple, and such as cannot seriously threaten the conservation of the forest. The objections stated to the policy of constituting "Protected Forests"

instead of "Reserved," obviously apply when there is a question of many rights; if an area has no rights burdening it, then no obstacle to management arises: as long as clear demarcation takes place, no difficulty will be found.

It will be observed that neither the Burma Act (or Regulation), nor the Madras Act, acknowledges any such class of Forest estate as "Protected Forest." The corresponding chapter (IV.) in the Burma Act, deals with the general protection of teak and other trees notified as valuable, outside Forests; and with prohibiting the use of the grazing, and of any natural produce of Government waste lands, except according to Rules to be made: and the Rules (sec. 38) do not prohibit any act which is done by permission or in pursuance of a right. This is as it should be. Here you observe a general care and protection given, which will prevent any gross acts of abuse, and any loss of area by squatting and clearing; this is sufficient, not perhaps for permanent Forest Conservancy, but for a time, while conditions are developing themselves. In the end, such areas will either be given up to cultivation, or, if the rights are found pressing (and therefore proper arrangements for their continued supply become desirable), the area will be made into State or Village Forest.

The Madras Act has followed the Burma Act. Under Chapter III., rules may be made (and sec. 27 contains a useful provision about *closing* places that have been unlawfully burnt): these rules are "subject to all rights now legally vested in individuals and communities."[1]

### (3) *Village Forests.*

In the India Act, Chapter III. makes mention of another class of Forests, which are real and fully constituted; but then they are only *some of the State Forests* (of Chapter II.) allowed by the Act to be dealt with by "assigning the rights of Govern-

[1] The insertion of the word "*now*" was intended to indicate that existing rights were respected, and not such as might be conceived as growing up *after* rules had been made and notified. I have some difficulty in understanding why rights *legally vested*, are spoken of, unless it is intended really only to save those that come under sec. 15 of the Easements Act, *i.e.* are strictly prescriptive (compare pp. 280, 1). This would be rare: in dealing with Reserved Forests, the prescribed jurisdiction of the Settlement Officer leaves it open to him to admit what he *equitably* thinks are rights; but here apparently, only rights *legally* vested are allowed: I expect that these, under the analysis of an instructed lawyer, would prove to be *nil!*

ment" therein, to certain village communities (*i.e.*, groups of landholders occupying the locally known village areas). I am not aware that this has ever been done in India.

I believe, however, I am right in saying that the idea of the framers of the Act was to *familiarize* the public mind with the idea of *Village Forests*. Because really, the constitution of these is a matter which will one day very likely come to be important. One of the great reasons why so much Forest is wanted in India, is the enormous demand there is for grass and grazing, for fuel and for the smaller class of building timber, for the population, whether right-holders or ordinary purchasers. And just as in Europe we find Forests made over (or otherwise belonging) to Cantons, Communes, and Institutions, so in time we may hope to see villages or groups of villages regularly owning well-managed forest. They will probably adopt some form of *petite culture*,—coppice, with a number of standards, for example; and the villagers, enjoying their share in grazing, fuel and timber cutting, will *not* be servitude or easement holders, because they will be realizing the produce of their own (jointly owned) forest. Really, the constitution of such forests —in which the rights of different (adjacent) villages could be separated, and each fixed on an appropriate area of Village Forest, would in many cases be a good way of satisfying the great question of popular demand for forest produce—far better than the idea of having forest areas nominally Protected Forests but open —under a vague and general control, and without definition of rights and interests.[1] But at the time of passing the Indian Act there were no *such* Village Forests in existence. The waste (even where it was wooded) that was given to villages at settlement, was not subject to any condition for its preservation as Village Forest. To constitute Village Forests under a guarantee that forest management would be duly main-

[1] At present the condition of Indian Forests is practically this:—there is a certain area of regular State Forest—which (as a whole) is not seriously or onerously subject to rights; there is a certain area of imperfectly constituted Forest, in which rights and concessions (or privileges) are largely exercised; and a still larger area of Government waste—under very lax control as "District" Forest and the like (not under the Forest Act at all). In this way the Government Treasury is credited with the proceeds of its State Forests, and with a small portion of the proceeds of the "Open," "Protected" or "Unreserved" Forests; and an enormous value in produce is annually given away without account. Would it not be much better to have but two classes — State Forests, and real *Village Forest* (the produce value of which could always be estimated) frankly *given* to the villages? This of course is a question of policy; the Madras Government, for example, has declared against Village Forests, holding that *State* Forests managed by State officers *so* as to provide for the wants of villages, are more likely to succeed, than Forests (to be managed as such) given over to villages under a certain State supervision. The Madras plan, if more efficient and possibly necessary at present, is however much more costly to the State.

tained, and therefore under a measure of *State supervision*, a new departure would have to be made by assigning fresh tracts. But it was thought that if a general provision was inserted, it would end in forest areas being hastily made over—areas which the general economic conditions of the province would rather require to be kept under full State management; and, what is worse, would invite the making over of such areas without a careful settlement of boundaries and of rights, and without any adequate security for simple but effective management. Therefore it was provided that *first* Government Officers should *settle* the areas under the regular procedure, and then hand them over to villages, not as private property to be broken up or dealt with at pleasure, but to be *kept and managed as forest and grazing ground.* It will be quite possible still to do this; and it should be observed, that really in such cases, the procedure under Chapter II.,—being undertaken with the direct object of constituting Village Forest,—will be a simple business; because the area would be so selected that it did not contain any rights *except* those of the village (or union or group of villages) to which it was going to be assigned; hence it would be a comparatively short and easy matter to find out what the requirements of the villages were, and arrange an area free of all outside or foreign rights—expressly to satisfy those wants.

When the Burma Act was prepared in 1881, it was considered possible, with reference to the large areas of waste or forest land in Burma, the general absence of rights, the sparseness of the population, and the prospect that a large number of villages would come into existence in the future, to go further. Section 31 of the Act, therefore contemplates that any area of available waste may be made a *Village Forest*, though any teak trees (always a royal tree (p. 207) in Burma) should still be reserved to Government.[1] The limits of the forest would be made clear by notification: State control is provided for,—

(*a*) By the power to make rules for management, and for the distribution of the benefits of the forest (sec. 33); and,

(*b*) By the power to declare *any* of the provisions of Chapter II. applicable.

In this case (sec. 34) all existing rights (which would rarely exist) would be saved. Those of the village (or group of

[1] In time, of course Government would, when the Village Forest was firmly established, grant these trees to the villages under proper conditions for their use and reproduction.

villages) to which the Forest was being assigned would become provided for by the assignment; and in the rare case of *outsiders* possessing (easement) rights, these would be settled (sec. 34, cl. 2) under the procedure of Chapter II.

The Madras Act contains no allusion to Village Forests of any kind[1]

This is a convenient point at which to refer to the special case of the ÁJMER Forests. In this small State (ceded in 1818) there are low hills which are known to be capable of bearing a very useful, if humble, class of wood and other material. And they have a two-fold utility:—

(1) They regulate the flow of water and the supply of water in tanks and wells.

(2) They furnish a resource for cattle fodder of immense value in periods of drought—if not of absolute famine,—which so frequently recur.

For the country is dry and rainfall precarious; occasionally falling with violent abundance, and often failing altogether. Cultivation is only possible with the aid of wells and "tanks" or embanked reservoirs. The former are dependent on the maintenance of moisture in the valleys, the latter are filled by rain-fed streams flowing from the uplands. It is obvious then that a clothing of any kind of forest vegetation on the hills, is of first-rate importance. At the same time, when famine occurs, the boughs of trees can be lopped, and grass collected; and thus many cattle be saved which would otherwise inevitably perish. When Ájmer was settled under the North Western Provinces Land Revenue system, the whole of the waste was divided up and given over absolutely to one or other of the villages, which were treated as if they were the joint villages of the North West. (In Rájputáná really, this tenure is unknown; the villages are mere groups of separate cultivators under a headman.) When the evil effects of this abandonment of the Government waste or forest became apparent, it was

[1] I have already alluded to the fact (p 238, *ante*) that the Government of Madras consider it better to let the Forests under full management of Government officers be the source for supplying the wants of villages There is no doubt much to be said for this view, though sound arguments are not wanting on the other side The Government Resolution on the subject will be found reprinted in the *Indian Forester* for *August*, 1891, and some remarks on the subject in the number for *April*, 1892 (Vol. XVIII. p. 150)

determined, in the public interest, to *resume* by law, a suitable portion of the waste and place it under Forest control as the property of the State. Compensation had of course to be given. Regulation VI. of 1874 explains the whole matter. The compensation consisted in,—

(1) Giving a right to cut grass. (Cf. pp. 335, 359.)

(2) A right to cut such wood as is reasonably necessary for household requirements[1] and agricultural implements.

(3) A share in the net profits of the Forests (after deducting all costs of working and management)—viz., two-thirds of Forest proceeds, and one-half of those from mines and quarries in the resumed lands.

The *rights* are to be exercised subject to *rules* made to prevent abuses such as cutting grass at certain seasons; for keeping certain areas closed as liable to injury by the grass cutting (sec. 5*a*); requiring written *passes* for cutting wood, specifying the *season* and the *place* (sec. 5*b*). There are also certain provisions (as usual) about pathways through the Forest. A share in the profits (as determined by the Commissioner, sec. 6) may be *forfeited* in case of certain acts of obstruction to Forest Conservancy, or neglect to render assistance lawfully required by the Forest Officer (sec. 7).

In the HAZARA hills on the N.-W. frontier of the Panjáb, the waste lands made over to villages at the time of the Land Revenue Settlement, most commonly included a good proportion of pine and other forest. Accordingly, in Reg. II. of 1879 (so far as it relates to Village Forests) the attempt was made to require the preservation and proper management of the *wooded* area—saving, *i.e.*, rights in land already broken up and brought under cultivation (sec. 8). The chief object was to secure forest growth, or at any rate grass land (or part grass and part wood), in dangerous places,—catchment areas of torrents, steep slopes, crests of hills, banks of streams, &c.

The village forest is to be immediately managed by Village Forest Officers subject to the control of the District Officer (Collector): the Government Forest Officers (in charge of the State or Reserved Forests) are to inspect and give assistance as

[1] It would include both building wood for principal and accessory buildings, and fuel.

directed by the Local Government. The Regulation proposes that for village forest, simple orders as to tree-cutting, &c., for the *year*, should be drawn up and adhered to. It must be admitted that these provisions represent rather an ideal, to be gradually realized, than rules which can all at once be enforced.

### (4) *Forests in which Government has certain rights.*

Under the Indian Act, brief mention is made in sec. 79, of the few cases in which Government has a certain *share* in a forest property. I know of one case where a half share in a forest property passed to the Government by escheat, on the death of the owner without heirs; and sec. 79 also contemplates the case where Government is "interested jointly" in the produce. In these cases Government is empowered, (a) To undertake the management, accounting to the other party for his interest; or (b) to leave the management in the hands of the other party, subject to regulation.

In the Konkan districts (sea coast of Bombay), the Khot's estates[1] come under this head; it was decided that forest land in the estate did not belong to the Khot; and sec. 41 of the Khot Act entitles Government to constitute Reserved forests (subject of course to any express terms of the Khots' *sanad* or title deed); but to render this palatable—for the Khots (as usual with proprietors of this class) had extravagant notions about their rights—a third share in the net income of the forest is allowed to them.

### (5) *Control of Royal trees.*

Lastly I may allude to 'royal' trees, or other trees the property of Government, standing in private lands; these may be protected by rules under sec. 75*c*, wherever they may be found growing.

### (6) *Private Forests.*

The conditions of Indian life have not yet produced any of those forests belonging to Institutions and Associations, which are known in Europe. Private forests however exist. In

[1] The Khots were originally officers who farmed the revenues, and grew into the position of proprietors in which they are now legally recognised. The Khot Estates Act is (Bombay) I. of 1880.

The Government may also proceed by expropriation if it prefers this; unfortunately also a power has been given to an owner, to whom an order to observe certain precautions, has been issued under sec. 35, to require the Government to proceed to expropriation (after three years have elapsed and before the expiry of 12 years).[1]

It will be observed that *Private* owners of forest, cannot apply the Forest law to their estates, and must rely on the general Criminal and Civil law for their protection; but sec. 38 of the India Act permits the owner (or a two-third majority of joint owners) to apply to have their land managed, under the Act, *by a Forest officer*, as a 'reserved' or 'protected' forest; and then all or any of the provisions of the Act may be enforced. Nothing is said about the *time* for which such arrangements are to last, but simply that the notification enforcing the Act may be cancelled (when the parties agree on this course).

In the next lecture we shall proceed to consider in detail, the steps necessary for constituting Forest Estates under the Act.

[1] I do not know of any case in which these provisions have been applied In the case of the denuded forest lands on the low hills of the Hushyarpur district (Panjab) in which operations are urgently called for, the lands belong to the villages, and yet it has been felt that the Chapter VI. could not be brought into operation.

# APPENDIX A.

## European law regarding the control by the State of Communal Forests, and Forests belonging to Corporate bodies and Institutions.

A brief description of the European laws regarding the State control of forests, belonging to Villages, Towns, Communes, Corporations and Public Institutions, will probably be useful, as such provisions may in time to come afford practical suggestions for guidance in Indian and other Forests.

It may be remarked that all these laws make provision that the Government should control the management of such forests to a greater or less extent; and it will probably be felt that if this is found necessary in countries which are completely civilised, it will be even more so where the peasantry are as ignorant as they are in India. Private owners, and even Communal Councils, are prone to look only to the present, and desire to make an immediate profit, without thinking of the future: the State, being imperishable, is free to a large extent, from this temptation. It is obvious that this and other considerations, forcible as they are in any country, are more usually applicable to India, where there is so much ignorance and backwardness in all matters relating to general economy.

In France, communal forests and those belonging to public institutions, are, equally with State forests, under regular conservancy and subject to the Forest law (Code For., Art. 90). This refers, not to little patches of woodland, but to lands of sufficient extent to be manageable as forests. Whenever the question arose, whether a particular piece of woodland was suitable for forest management or not, it was determined on the basis of a proposal of the Forest Department, which was discussed with the Municipal authorities, or the guardians of the public institution, concerned. When the "forest" has once been recognized as such, it must be worked methodically. All proposals for change in the plan of working or in the method of disposing of the material, all proposals to manage some of the lands as pasture, or to put others under wood, must come from the Forest Department and be submitted to the Municipal authorites as before. If they cannot agree, reference is made to the "Conseil d'État." No clearing of the forest (completely) is allowed, without

the express approval of Government (Code For., Art. 91). Nor can partition be allowed, except where two or more communes may have shares in one forest and desire to separate them.

Both these provisions should most certainly be applied in India. It would defeat the object for which village forests were constituted, if the forest were broken up, and each headman (or the holders of a "patti" or section of the village), were allowed to regard a specific portion of the forest as exclusively his or theirs; nor would any forest management be possible.

All cuttings have to be made according to a plan of operations by the regular agency. No irregular cuttings on the part of the community are allowed (Code For., Arts. 100–103). The produce in building timber as well as the firewood in stacks, has to be cut, prepared, and handed over to each person entitled, in the proper quantity. Sales of the produce of the forest (not required by the inhabitants for their own use) are conducted, just as in a Government forest, in the presence of the Mayor.[1]

A useful provision is also made for *keeping in reserve, to meet unforeseen contingencies*, a certain portion of the wood that might otherwise be cut. Such a plan could only be applied in detail, in India, with reference to local conditions.

As regards *establishments*, the Forest guards are appointed by the Mayor and Municipal Council, but the nominees must be approved (*agréé*) by the Forest Department. If there is a difference of opinion, the 'préfet' decides. The same guard may have charge of a 'canton' of a State forest and of one in a communal forest; but in that case he is appointed by the State.

Communal forest guards are in all respects under the same rules as State Forest guards (Code For., Art. 99). They take the same oath and have the same powers as regards making written reports (*procès verbal*) of offences, and other matters transacted under their own observation; and these reports have the same value as *primâ facie* evidence in court. The Communal guards are under the orders of the superior staff of the State Forest Department. As this supervision costs the State something, Article 106 of the Code provides that the State is to be recompensed by a payment of one-twentieth (or five centimes in the franc) of the sale value of all forest produce, principal and accessory. Products delivered or used in kind, are valued, and one-twentieth of the value is paid into the treasury.

[1] In Meaume, Vol. II., §§ 497—588, an elaborate *exposé* of Art. 105 of the Code is given, regarding the method of distributing firewood to the inhabitants—so much for each hearth (unless there is an express right otherwise)—the method of giving timber for repairs and building, and so forth. It would not be useful, in our present stage in India, to go into any detail regarding these provisions.

Besides this, the commune pays the salaries of the guards. But beyond these two items, the State makes no other charge for supervision, for survey, &c.; nor any charge for conducting cases and prosecutions in court, since if fines and compensation are recovered, these go to the State.[1] The salaries of the guards and the payments to the treasury, form a first charge on the income from the sales of the yearly fellings (Art. 109). When all the material is used by the commune, and the commune has no other resources, a portion of the yield (sufficient to meet the charges), must first of all be deducted and sold by auction before the rest is distributed.

All the provisions of the Code relating to the regulation of rights, their commutation, the prohibition against grazing goats and sheep, and so forth, that are prescribed for State Forests, apply equally to Communal Forests (Arts. 110–112).

I have dwelt at this length on the provisions of the French law because many of these rules may in time, come to be adopted in Indian practice, and are indeed admissible under the Act. It is also certain that we shall have to maintain the principle of State control, in whatever form, though the nomination of the guards may be left to the villages, subject to the approval of the Government officers.

The GERMAN STATES do not all follow the same plan. In some, the State manages as in France; in others it only exercises a general supervision. In Bavaria, for example, the supervision (*curatel*) extends to the following matters[2]—

(1) To requiring the consent of the Government, before such Forests are sold, leased, mortgaged, or otherwise alienated, or a partition takes place.

(2) Forests cannot be cleared or converted into meadow or arable lands either wholly or partly.

(3) To seeing that the Forests are worked properly, not wasted; that blank places are stocked and restored, that extraordinary fellings do not take place without special sanction.

(4) To the audit of accounts.

Under the third head is included the duty of seeing that there is a suitable plan of operations on record[4] and that it is properly carried out; that proper precautions are taken to protect the Forest against natural calamities as well as Forest offences.

[1] See Code For., Articles 107—8.

[2] Roth, par. 83, p 68. The Saxon law is similar; the State has only a "certain supervision" (*eine gewisse überwachung*) Qvenzel (p. 7).

[4] Which also involves seeing that rights are properly settled and regulated, that attention has been given to making the yield continuous and perpetual, and such as is most in conformity with the wants of the community or institution.

In all laws, as in France, partition is forbidden.[1]

The commune has to provide the protective Forest staff. It also appoints those who manage the local Forest operations, but must select persons who have passed the necessary Forest examinations.

The superior Forest inspection and control are supplied by the State officials. The Government bears the cost of this, but the commune pays all expenses of local management, working, and protection.

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## APPENDIX B.

### Note on the European Law regarding Forests which have a Protective character in mountain districts, &c.

In Europe, the subject of the Conservation of Forests in mountain countries and other places of danger, and where the existence of forest is a protection against landslips, torrents, avalanches and the like, has a great importance; because a large number of such forests are either private property, or belong to Cantons or communes. There is no hesitation in subjectng these to legal control, in the interests of the public.

The French law at the outset states, 'that private forest-owners will enjoy their property fully, subject only to the provisions of the Code.' Those provisions will be found in Articles 117-124 and Articles 136 and 219. The last is the really important one. Under it, the clearance of forest (*défrichement*) is not allowed without the proprietors giving four months' previous notice at the office of the Sous-préfet. For under certain circumstances, the Forest Department may record an *objection* to the clearance. Article 220 states the circumstances under which the Forest Department can file this objection; it is when the preservation of the forest "is recognised as necessary";—

(1) For the maintenance of the soil on mountains and slopes.

(2) For the defence of the soil against erosion and being flooded and overborne (*envahissement*) by streams, rivers, or torrents.

(3) For the maintenance of the water supply in springs and streams.

[1] So in Austria (Law of 1852, Art. 21).

(4) For the protection of dunes, and the coast, against erosion by the sea, and the spread of sand.

(5) For the defence of any territory in such part of a frontier zone as may be specified by a public order of the Administration concerned.

(6) For the benefit of the public health (*salubrité publique*).[1]

The process of objecting is this: the Forest Department gives warning to the parties interested, and sends an officer to inspect the place and draw up a minute report on the state, situation, and circumstances of the forest. This is communicated to the forest owner, who is at liberty to record remarks on it. This "procès verbal" when filed in reply to the notice, constitutes the departmental act of objection to the clearance. The Préfet in Council now considers the matter, and notice of his decision or opinion is given to the Forest officer and to the proprietor, when the whole proceedings are sent up to the Minister of Finance, who, after consulting the proper section of the Conseil d'État, finally decides the matter. The Minister must give his orders within six months of the Departmental objection being signified, or else the proprietor is at liberty to proceed with the clearance.

The other provisions of the Code (Art. 117-121, &c.) relate to minor matters. Private forest guards must be approved by the Sous-préfet, and must take the oath of Forest Service Private proprietors may claim to free their forests of rights, by the same means as Government can, by "cantonnement" and money compensation. So too, a private proprietor can keep grazing out of the growing portions of his young forest, and can apply to the Administration to declare what parts of his forest are not safe against cattle and should be kept closed.[2]

A proprietor who makes a clearing after it has been prohibited, is

[1] Certain lands are not considered "forests" for the purposes of this Article; for example, a park or pleasure-ground attached to a dwelling-house, and generally, small plots of woodland, not exceeding twenty-five acres in extent, unless such plots are on the summit or slopes of a mountain, when they are not excepted. An important exception also is that if the wood has been planted within the last twenty years, it is exempt. The idea involved in this rule is, that the forest is not a gift of nature which the proprietor can be asked to use for the benefit of the neighbours as well as himself; he planted the wood, and if he had not done so, there would have been none, so that no one can complain if by cutting it down he merely leaves things no worse than they were naturally (Art. 224, but see p. 252.) All plantations of trees on the tops and slopes of mountains are declared exempt from all taxes (*de tout impôt*) for thirty years, by Art. 226. This is to encourage planting in such situations.

[2] Article 124 gave a right, for ten years after the passing of the Code, to the Marine Department to have a first refusal of oak trees of a certain size whenever cut for sale; this has long since expired.

liable to a fine of at least 500, but not more than 1,500, francs, for every *hectare* cleared (that is approximately, 80 to 240 *rupees* per *acre*), and to be made to replant the cleared places within three years. If this is not done, the Department may, on an order of the Préfet, do the planting by its own agents, and recover the cost from the defaulting proprietor.

These provisions of the law are general; besides them there are the special laws for "reboisement" and covering with turf and herbage (*regazonnement*) denuded mountain areas, which are printed together with the Forest Code in the Departmental pocket edition.

It will not be necessary to do more than glance at the provisions of the older law of *reboisement*. The first enactment was contained in a law of July 28th, 1860, and a subsequent law of 1864. These first laws[1] had some rather complicated provisions for publishing by the Executive Government a "declaration of public utility," and then the 'périmètre,' or area selected to be operated on, was declared, after an enquiry by a series of authorities, among whom was a Special Commission. It seems that this discussion included the question whether the work was needed at all, and whether there was any danger: this it was improper to allow, since the interested parties and the Government should settle the matter, before any notification is issued at all. Various provisions were made in cases where private or communal owners of land in the declared *périmètres*, undertook to do the work themselves.

There was at first much opposition to the law; and it was urged that in a great many cases it would be as well (or better) not to create forests (*i.e.*, *reboise* the lands), but to restore the *grazing* ground, *i.e.*, the soil would be consolidated by restoring its covering of turf and herbaceous plants; this of course could be done with much less restriction on the communes, and in a much shorter time, than reboisement. A further law for "regazonnement" was then passed in 1864. Any perimètre formed under the law of 1860 might, on application of the commune, be reconsidered, and the order for its reboisement altered by the substitution, in whole or in part, of *regazonnement*. These laws now stand repealed by the law of 14th April, 1882.

The new law deals with the areas declared under the law of 1860—64, in the following way. It gives the Forest Department three years to consider the whole subject, the areas being meanwhile maintained *in statu quo* (Art. 16). Within this period, the Forest

[1] They were not quite the first; there was an attempt in 1805 (4th Thermidor, an XIII.) to protect mountain forests with reference to the torrents in the Hautes Alpes. This enactment is still printed in M. Puton's Manual of the Codes.

Department are to consider what lands it is desirable to retain as *périmètres* under the existing law, and it is to publish a list accordingly. All lands not shown in the list, will then revert to the unrestricted enjoyment of the proprietors. A further period of five years is fixed (Art. 18) for the settlement of all claims which may arise consequent on the expropriation, according to the terms of the new law, of the lands which are selected (and which, under the old law, may not have been completely expropriated).

The law of 1882 deals with the entire subject of mountain slopes and their preservation, under *four* different conditions or stages of necessity.

(I.) In cases where the *danger is actually existing*—the soil already ruined, and torrents formed—works of restoration will be necessary. This necessity will be declared by a special law in each case passed by the Chambers (Art. 2), and determining the area to be treated.

The passing of such a law will be preceded,—

(1) By an enquiry in each commune concerned;

(2) By a deliberation of the Municipal Councils of each commune;

(3) By a reference to the Council of the *Arrondissement*, and of the Conseil Général;

(4) By a further reference to a special committee under the presidency of the Préfet, consisting of certain members of the Councils, two members to represent the interested commune, one engineer, and one forest officer.

This discussion *cannot touch the question of the necessity for action* and the existence of the danger (as it could under the old law), for these points have been settled by the passing of the "law" for the undertaking of the work. Objection can only be taken to the extent of the périmètre and other subsidiary matters. The necessary maps and plans are deposited for inspection: the préfet notifies the fact of the law being passed, to each interested commune or institution.

The works on the périmètre are undertaken by the State, and the area is acquired as State property, either by amicable arrangement or under the law of expropriation (Art. 4). Private persons, communes, &c., will, however, be allowed to avoid expropriation and undertake the works themselves, if they can come to suitable terms with the Government: and they may form 'associations' with a certain legal status, in order to carry out works which would perhaps be beyond the power of any one estate by itself.[1]

[1] The details of procedure, as to how private persons are to signify that they will carry out works, and when their refusal may be assumed; how the works are to be carried out on lands expropriated, and how an account is to be sent in

(II.) When there is *not this actual existing danger*, but only a necessity to preserve the forest, so as to *prevent* the possibility of danger, the law allows (Art. 5) that public aid may be given (by gratuitous gifts of seed, plants, &c., or by money grants, or by executing particular works), in order to promote works of plantation, amelioration of the pasturage, or consolidation of the soil. The Art. 224 of the Forest Code, which ordinarily excludes plantations made within the last twenty years by the proprietor from the rule which restricts the total clearance of forest land, is declared not to extend to any reboisement made under this law (Art. 6).

It must of course much depend on the angle of inclination, the elevation, the nature of the soil, and other circumstances, what sort of work for restoration will suffice—whether replanting or turfing, or growth of herbaceous plants. Sometimes alternate belts of meadow land and wood prove useful. A system of "*fruitières*" has been established in connection with *gazonnement* works, which I understand to be reserves or nurseries for the production of seeds of forage plants on the large scale, and of roots for cattle feeding. The object of this and other devices of the kind, is to reduce as much as possible the inconvenience caused by the necessary exclusion of grazing.

(III.) Yet a third stage is provided for. Where it is sufficient merely to stop or regulate grazing, without taking up a périmètre for regular reboisement operations, the land can be subjected to protective closing against grazing (*mise en défens*). This can be done "in mountain lands and pasturage belonging to Communes" whenever "the state of degradation in which the soil is, is not sufficiently advanced to necessitate actual works of restoration"(Art. 7). The existence of this state of things is determined by a decree of the "Conseil d'Etat." (based on official Departmental report). An inquest is held (previous to this decree) by the same series of Councils, &c., as before; and this inquest fixes the period of closing (up to a limit of ten years); the limits and situation of the lands to be dealt with, and the award of compensation to proprietors for "*privation de jouissance.*" The sum paid goes partly to the municipal

showing what the cost has been; (this sum an owner will have to refund, if he claims the restoration of the land), and all other matters, are contained in the "Règlement d'Administration Publique" for carrying out the law (prepared under Art. 23). The procedure under the law is somewhat elaborate, and it certainly is far too much so for any Indian district. The fact is that ignorant municipalities might, and I believe do, or did, give very great trouble, and put every obstacle in the way of reboisement work. Such a law, so restrained by the elaborate procedure for consultation and revision of every project, before the orders for the work can issue, would certainly be inefficacious, but for the progress of public opinion, and the fact that in many cases the périmètres have got so bad that the necessity for action has become obvious even to the most unreasonable: above all there is the example that successful works set to the communes in the country round.

fund of the commune, partly to the inhabitants of the commune whose rights are suspended. At the expiry of the ten years, if "the State" desires to prolong the protection, it must expropriate the area should the owners so require (Art. 8). The State can execute (during the *mise en défens*) any work which will aid in the consolidation of the soil without changing its character. The ordinary Forest-law penalties are applied in cases of infringement (Art. 11).

(IV.) A fourth stage is also contemplated, *viz.*, when neither there is an actually existing state of denudation or danger from torrent action, &c., nor a prospective danger, nor such a degree of deterioration as would demand a closing of the area; but simply when the *pasturing of cattle ought to be regulated so as to preserve* the grazing ground from deterioration (Art. 12). The communes which this provision affects, are to be specified in a list (prepared by the Forest Department) as directed in the "Règlement" under Art. 23, and revised from time to time. These communes are to submit annually to the Prefet, a statement showing the communal lands subject to pasturage; the *number* and *kind* of cattle which have to be allowed to graze; the beginning and end of the season of grazing; and other conditions necessary to secure the desired result. If they neglect to submit a scheme (*projet de règlement*), or if the Forest Department do not approve of the proposals as sufficient, and the communes decline to introduce the necessary amendments, the Prefet is given power to enforce a proper scheme of management (which must be recommended by a special committee assembled for the purpose of deciding the matter (Art. 13). Certain penalties of the *ordinary criminal law* are applied in case of a breach of these regulations.

### *German Legislation.*

In PRUSSIA a law was passed in 1875,[1] applying to all forests which have a "protective" character. Practically, as State and other public forests are already under the forest *régime* (which is not affected by the law in question), this law chiefly affects private forests.

The list of circumstances under which action may be taken, is given here for the sake of comparison with that in the Indian Act. Forest has a protective character and its destruction may be prevented when,—

(*a*) The soil is sandy, and consequently neighbouring fields, public works, and watercourses (natural or artificial) may become covered

[1] Jahrbuch des Preussischen Forst, 1876, No. 8. There is a French translation (which I have used) in the *Revue des Eaux et Forêts*, Vol. 15, p. 240.

or choked with sand which would be let loose by any destruction of the forest which binds the soil and covers its surface.

(*b*) Where, as a consequence of erosion of the soil, or the formation of ravines and torrents on denuded summits and slopes of mountains, subjacent properties, roads, or buildings, are menaced with injury, or with being buried beneath landslips and falls of stones, or even with being carried away by the landslip itself.

(*c*) Where, if forests on the borders of rivers and watercourses were destroyed, the neighbouring estates would be liable to damage from floods; or where works of any kind are protected by forest from the effects of the rush caused by the sudden melting of ice and snow.

(*d*) Where the clearing of forest growth would diminish the water-supply in streams and rivers.

(*e*) Where such clearing might, in country of an open or generally bare character, or in the neighbourhood of the sea coast, expose villages and their cultivated lands to the action of storms.

In all these cases a proposal may be made, and a decision on it given, with the object of regulating,—

(1) The manner of cutting and working the forest (exploitation).

(2) The execution of planting works.

(3) The construction of accessory works, such as dams, weirs, spurs.

The proposal can only be entertained when the loss to be guarded against, is shown to be greater than the loss to the forest proprietor from suffering the restrictions and carrying out the works proposed.

The various parties who have the right of initiating the proposal before the proper public tribunal, are enumerated. The proposal has to be examined, and one of the members of the tribunal (or even an expert unconnected with it), is appointed as Commissioner to draw up a project stating the particulars of regulation, and the works required in the case. This project is then deposited, so that interested parties may study it and send in objections if they wish to do so. Objections, if any, are decided on by the tribunal. The question, however, whether danger does or does not exist (if this is disputed) may be gone into as a preliminary before the project is prepared.

If the project is accepted and interference takes place, the forest proprietor is indemnified for his loss and for his expenditure on planting and other works. The party making the proposal is responsible for the indemnity, and for the cost of making and keeping in repair the necessary works; but in cases of danger—(*a*), (*b*), and (*c*), (above mentioned) the proprietors of all the estates menaced must contribute in a proportion fixed by the law. In all

cases, the forest-owner must contribute to the expense of works of protection, in a proportion also fixed by the law.

The BAVARIAN law of 1852 (Art. 35) provides that private forest may, as a rule, be cleared, if the object is to devote the land to agriculture, to make it into a vineyard, or re-stock it with a superior class of forest trees; but this is not to be done if the forest is "protective" (*Schutzwald*). Article 36 specifies three kinds of protective forest,—

(1) *All* forest on summits and steep slopes of mountains;

(2) Forest which protects against falling stones ("stone-shoots" I might call them—sudden discharges of masses of loose stones), avalanches, and landslips.

(3) Forest belts which protect against shifting sands, and against the destructive action of rivers and streams.

No form of working by clearing entire blocks (*Kahlhieb*) is allowed in any protective forest; nor must the forest be "devastated" *i.e.*, worked in a destructive and wasteful manner (*verwustung*). Blanks and insufficiently stocked places must be planted up.

The AUSTRIAN law of 1852 in some respects resembles the French law. No forest can be absolutely cleared away without permission. State forests can never be cleared save with special State sanction in certain grave and exceptional cases, as in time of war, &c.

No forest must be "wasted" so that it will gradually cease to exist as forest and timber growth become impossible.[1]

Private owners may be compelled to re-stock blanks in their forests if these have a protective character. One forest must not be cut down so as to expose another to the action of wind and storm; a belt twenty *klafters* wide must be left. In all forests at a great elevation, or on steep slopes, and wherever there is risk of the soil giving way, the forest must only be cut in narrow strips, which must be immediately re-stocked. Timber forest near the limit of tree vegetation must always be cut by the selection method (jardinage—plänterhieb,[2]) as this does not expose a large area of soil at once.

Forests of private owners are said to have a 'protective character' when they require special maintenance and treatment in the interest of the "security of the population and the safety of public and private property" against the various dangers which are enumerated, very much as I have already more than once stated. Private forest in such case may be placed under restrictions (*bann*) by public authority.

[1] Articles 6 and 7. [2] Articles 2—4.

Compensation can be claimed where this results in a restriction of rights and the enjoyment of the property.[1]

In ITALY *all forests*, within certain limits of altitude of situation,[2] are placed under the provisions of the Forest law (*sottoposte al vincolo forestale*). But lands cultivated with vines, olives, and fruit trees, and suitably terraced,[3] are exempt from this rule.

Clearing and grubbing up by the roots (*disboscamento e dissodamento*) are prohibited; but permission may be given to change a forest into *bonâ fide* cereal cultivation, if it is shown that means are provided to prevent any risk. A Forest Committee[4] is to lay down certain principles as to the maximum amount of cutting, the method and locality of cutting, so as to prevent injury to the soil and secure the natural reproduction of the forest. To these the forest-owner is bound to conform.

The Forest Committee is charged with the duty of making a list of all lands that in their opinion come within[5] the terms of law; and provision is made for hearing the parties interested, and deciding objections to the list.

There is a chapter on reboisement work. It is not necessary to give details. It applies to the lands under the Forest law (*vincolati*) according to the terms of the statute. The proposal for reboisement work is originated either by the Minister of Agriculture, or the provincial or communal authorities. The work is carried out at the joint expense of the Government, the province, and the communes interested. The Forest Committee direct the work. The State is

[1] Article 19. A provision is added which I should say was singularly inefficacious, *viz.* that the forest-owner is to *take an oath* that he will observe (he is held responsible for so doing, besides) the special regulations prescribed for the forest placed in *bann*. Inspection is of course provided for.

[2] The forests so situated are described in the law (June, 1877) as "all woods and forests and lands covered with woody-stemmed vegetation (*piante legnose*) (*a*) on the crests and slopes of mountains up to the upper limit of the growth of the chestnut (*Castanea vesca*), and (*b*) those which from their nature and situation might, if they were cleared away and rooted up, give rise to landslips, subsidences of soil, formation of precipices, avalanches, disturbances (to the public detriment) of the flow of water, alterations of the consistency of the soil (*e.g.* bringing about a marshy state of the ground), or damaging local hygienic conditions."

[3] Compare Hazára Forest Regulation II. of 1879, sec. 20.

[4] A committee consisting (*a*) of three members nominated by the Provincial Council; (*b*) of an engineer nominated by the Minister of Agriculture, Industry, and Commerce; and (*c*) an Inspector or Sub-inspector of Forests. The "prefetto" of the province is *ex-officio* president. These committees are a very unfortunate provision: local interests constantly obstruct progress; and the Engineer and the Forest Officer, who know what ought to be done, being only two, are outvoted. It is impossible to manage Forest matters by a sort of debating club!

[5] I do not go into detail, as this list has long ago been prepared; it would naturally exclude some lands that might have been included by older law, and include some that were in 1877 for the first time brought under the terms of the law by the definition above described.

always allowed to expropriate against an indemnity, any of the lands that come under the forest *vincolo;* unless indeed the proprietor make a declaration that he will undertake to do the reboisement work in the manner and within a limit of time, prescribed by the forest committee. Provision is also made that a number of proprietors wishing to act together in restoring a certain area, may form themselves into a recognised legal association (*consorzio*); and if some persons having lands in the middle of the group, will not join, the rest may claim to expropriate him and acquire the land in question, so as to enable them to carry out their scheme.[1]

Lastly, in this review of continental laws, I propose to notice the general law of 1876 for the maintenance of protective forests throughout SWITZERLAND.

In many Cantons there exist local laws for the preservation of forests, and in some the laws have been well observed for many generations.[2] But even where laws exist, they vary from place to place; while in other parts there were as yet no laws; so that it became highly desirable for the Federal Legislature to agree on a common measure for protection of forests. This was the more important because the destruction of forest produces evils that are felt far beyond the limits of the Canton in which the forest lies. The action of one or two torrents may be the cause of sudden and disastrous floods, which affect the river into which they discharge themselves, and sweep away or overflow properties many miles downstream. A road may be covered with *débris* from a single badly denuded locality, and the communication of half a dozen important towns may be affected by it. Hence joint action was especially desirable.

The law applies to all mountainous Cantons and to such parts of other cantons as are mountainous and as are declared to be subject to the law. In this zone of the federal forest-*régime*, *all* forests whether public or private, are under the "surveillance" of the Confederation, if they have a protective character; and all *public* and *communal* forests are included, even if not strictly speaking protective.

Article 4 describes what "protective" forests are; and in order to

[1] Law of 1877, Art. 14. A number of these provisions are very excellent on paper; but unfortunately, too much is left to the committees, which may have a majority of ignorant and prejudiced persons, who can defeat every proposal for enlightened action. Forest restoration demands foresight and a deliberate consent to put up with some present inconvenience for the sake of future safety; but the form 'ignorance' takes in forest matters is always a shortsightedness which can see nothing but the immediate present. Hence it is that the Forest law has worked so little good in Italy.

[2] Especially the Northern Cantons. See *Revue des Eaux et Forêts*, Vol. XV. (July 1876), p. 233.

complete the series of definitions which I have already given from several European laws for the sake of comparison, I will translate this also :—

"Forests of a protective character are those which—by reason of their elevation, or their situation on steep slopes, on mountain summits, ridges, spurs (*saillies*); or in the catchment areas of streams; in mountain passes, ravines, and along the banks of streams and rivers; or being in a country generally devoid of trees; —serve as a protection against climatic influences, ravages by wind-storms, avalanches, falls of ice and snow, stone-shoots, subsidence of soil (*affaissement*), undermining of the soil by water (*affouillement*), erosion of ravines, and torrents and inundations."[1]

All Cantons are charged with the duty of settling and declaring within three years what forests come under the law and what do not; and they *must demarcate all protective forests* within a period of five years.[2] The Confederation appoints an Inspector and staff to see that everything is carried out according to the law.

Article 9 provides that the cantons shall open schools of forestry or give instruction (*au moyen de cours de sylviculture*), so as to provide for training a number of forest employés.

Article 11 unfortunately leaves it to the authorities of Cantons to allow any part of the forest to be cleared: this is very dangerous; but complete clearing in a protective forest is absolutely prohibited, and also of forests in the neighbourhood of protective forests, if such clearing would compromise the existence of the (protective) forest itself. No exception can be made without sanction of the Federal Council.

As usual, partition of communal forests or their alienation, is prohibited.

All rights of grazing and other forest rights are to be got rid of by compensation within ten years, if they are "incompatible" with the maintenance of the forest in such a state as to fulfil its object. Wood-rights, if they cannot be bought out with money, may be commuted for a "parcel of land of the same nature" elsewhere. (Art. 14).

All rights may be regulated and restricted to being exercised in certain portions of the forest only; or if necessary, they may be "suspended or suppressed" (I presume with compensation under the preceding article).

[1] Protection against shifting sands, or against malarious influences, would naturally not find a place in Swiss mountains.

[2] This unfortunate limit has ensured the failure of the good intentions of the law. It would have been wiser to have fixed no limit at all, or said twenty years instead of the absurdly inadequate five.

No new rights are allowed to grow up.

All forests are to be managed according to schemes of working which are to fix the maximum annual yield. The cantons are to arrange for the protection and exploitation of the forests.

A very necessary provision then follows. Hitherto, the law has only spoken of the protection of existing forests; but there may be many cases where now there is only bare land where there ought to be forest. Article 21 accordingly provides that "lands which might become important protective forests within the meaning of Art. 4," shall be reboised on the requisition either of the Government of the canton or of the Federal Council. If these lands appear to be private property, they must be expropriated under the usual law. The Confederation will aid with its common funds important works of reboisement.

These are the chief provisions of the law which are likely to interest an Indian student.[1]

[1] When I received the text of this law there was still an opportunity, though a short one, for its being altered; but I have not heard of any amendment being introduced.

## LECTURE XVII.

### THE LEGAL CONSTITUTION OF FORESTS.

OUR next step is to turn to the Forest Acts themselves, and see what procedure has been provided for bringing Government lands formally under the Forest law;—constituting them forests of one class or another, or at any rate making them subject to certain rules or orders.

The process that demands our attention first, is that which will result in a regular and complete constitution of permanent forests on a satisfactory footing; that is the procedure under Chap. II.

Naturally the first step is to give information to the public and those locally interested, of the intention or proposal to form such a forest. The notification issued in the *Official Gazette*[1] specifies 'as nearly as possible' (for subsequent proceedings may modify the area) "the situation and limits of the proposed forest." It also appoints a "Forest Settlement Officer" whose duty it will be to enquire into, determine, and record, all claims, whether to ownership of land, or to other rights. A special Commission of not more than three persons may be appointed in lieu of a single "Forest Settlement Officer." The law provides that generally speaking, the Forest Settlement Officer is to be a person not being a member of the Forest Service (so that he may be quite impartial).[2]

As the Official Gazette is not always read, nor likely to be known to the people on the spot, the Forest Settlement Officer is directed to take measures for translating the notice and publishing it widely, so that no one may have the excuse that he did not know of the proposal, or the necessity for coming forward and stating any claim or any objection he might have. A period

[1] Each Province has its own Gazette published in English and the vernacular: the "*Gazette of India*" is the Official Gazette of the Supreme Government (Govt. of India).

[2] He comes within the definition of 'Forest Officer" in the Act, because he is appointed to certain duties under the Act; but that is obviously another matter.

of three months is allowed for submission of claims; and these may be presented in writing. But that is not enough where the people are ignorant; they are therefore also invited to state orally what they want, and the Forest Settlement Officer (I use F. S. O. as a convenient abbreviation hereafter) will reduce to writing what they claim. Indeed, the F. S. O. is directed to go further, and undertake the part of the friend of the timid and ignorant, by taking the initiative and trying to find out from records, and by local enquiry, what rights really exist, even if not at once claimed. (Compare also sec. 6 of the Madras Act on this subject.)

As this necessary interval must elapse before any final security can be given to the proposed area, it is expressly provided that complications are not to be introduced by making fresh clearings and acquiring fresh rights.[1] But fresh clearings might in some cases be a necessity, and therefore the prohibition has been (in the amended Act) made subject to any local rules that the Government may think fit to enact.[2]

If after all efforts to ascertain claims, none appear, then the law declares (sec. 9) that any possible but undiscovered claims shall be extinguished; but even then there is still a safeguard provided; for there is a final notification of the forest to be made at the end of the whole procedure, and if before this is issued, a claimant can show a sufficient excuse for not coming up before, he will still be listened to.

It will be found as a matter of fact, that the claims made or discovered, will be one or other of the following kinds:—

(A.) A claim to the whole *land itself*, or (more likely) to one or more *plots of land* within the proposed forest.

[1] Supposing for instance, a claim which happened to rest solely on a legal prescription of twenty years; and the period was not complete before the notification issued, it would fail, as prescription would cease to run, and the term could not be completed.

[2] The Madras Act leaves it to the F. S. O. to give permission in writing where any exceptional clearing or other act is to be allowed. The "pattá" referred to in the Madras Act is a written permission to cultivate: the term indicates the practice of giving out a lease or permission (under the ordinary Revenue procedure) to applicants for waste plots or "numbers" for cultivation. This procedure exists in raiyatwári provinces like Bombay, Madras, Burma, Assam, etc., where no area of waste has been given over to the villages at Settlement for the extension of cultivation, and where therefore any villager who wants to get an extra field has to look out for a suitable plot (either waste or abandoned by some one else) and apply for it; the permission to occupy (subject to revenue-payment) is locally called a "pattá."

(B.) A claim to a right of the class (pp. 79, 80) which does not involve taking any produce from the estate, *e.g.* a right of way, or cattle-drive; a right to have a water-course (canal cut or drain channel) across the land; a right to have access to, or use of, water, such as a spring for household purposes or cattle watering.

(C.) A right of easement which does involve taking some produce or part of the estate: *e.g.* to dig clay, limestone, to cut turf or sods, to burn lime or charcoal, or boil catechu, to cut grass; to pasture cattle, to cut wood; and in fact, every class of the well-known 'forest rights' or easements, which we shall subsequently consider in full detail.

(D.) A claim to practice "shifting cultivation" [*júm*, Bengal), *kumrí* (S. India), *dahyá* (Cent. Prov.), *taungyá* (Burma)]. This is a destructive process and therefore nowhere recognized as an easement: but certain wild tribes and local villages could not, in the present state of society, exist without it; and it is necessary, under certain circumstances, to make provision for its exercise, as a matter of concession.

Each one of these kinds of claims will require a different mode of disposal; and I will describe first what is done in the cases (A.), (B.) and (C.). The case (D.) not being a question of *right*, will be dealt with in another place.

(A.) The first kind of claim likely to be put forward, is to the ownership of the *land* itself or some part of it. If the claim should affect the soil of the whole forest or the greater part of it, it would follow that the proposal to create a forest-estate under the Act, could not be carried out: the proceedings would then be closed, on the decision going in favour of the claimant: unless indeed it was some special case in which the forest was, on public grounds, so desirable, that Government would be justified in declaring public utility (under sec. 83 Forest Act) and proceeding to acquire the estate under the Land Acquisition Act.[1]

I may be here allowed what is perhaps something of a digression, to allude to the case where by the action of the Officers at a Land Revenue Settlement, the Forest has been all included in the area of village estates, so that they can graze in, and otherwise use it,

[1] I have already observed (p. 228 *note*) on the mistaken notion that prevailed as to sec. 3 of the Forest Act as tending to deprive people of their property.

although the right in the timber-trees has been reserved to Government. This state of things has been already noted, as existing in the (Sub-Himalayan) district of Kángra in the Panjáb. It has been decided that the soil belongs to the villages,[1] but the Government owns the trees and the right to reproduce them (*i.e.* has the use of the surface as long as the trees are growing or can be grown). No attempt has been made to place these forests under the Act, because though the terms of sec. 3 are *primâ facie* applicable, it has been held that as the villages could claim the land (sec. 10), the Forest Settlement could not go on without satisfying the whole right in the soil, which would be impracticable even if funds were available. The Act ought perhaps to provide expressly for such cases; for clearly it was always intended the Government should manage such lands, as appears from sec. 79, of the Indian Forest Act: but the section is perhaps not sufficiently explicit to enable the Government to take action in the case of the Kángra forests. As a matter of fact, old rules (having the force of law under the Indian Councils Act, 1861) (p. 189) exist, but they were allowed to fall into abeyance—which is a matter of detail I cannot here go into—and it is now difficult to arrange matters.

But to return to *claims to land* in the proposed forest. What usually happens is that one (or many) plots inside the forest have been cleared, and cultivation established.[2] If the case is shown to be one of an unauthorized clearing, or a case of squatting with no equitable title, the claim would be disallowed.

It will, however, sometimes happen that a plot has been cleared or appropriated without regular authority, but still the circum-

[1] Some details may be seen in my Land Systems of Br. India, Vol. II. p. 546 and *notes*

[2] In Himalayan forests, the habit which the people have of clearing a little patch here and another there all over the forest, is inveterate, and has to be guarded against. These little patches are often commenced by a permission, not to cultivate, but to cut three or four trees only; a clearing is then surreptiously made on the spot where the trees were felled: at a suitable opportunity, the little patch is further extended round the edge; then a few more trees are cut, or are observed to die conveniently; ultimately two or more of these patches unite into one. This process goes on until either the forest disappears, or else is so "honeycombed," that unless the land can be reclaimed for forest and planted up, the utility of the whole is destroyed. Land brought under cultivation in this way may always be regarded with suspicion. It should be measured, and, whenever it is possible to trace the permission to clear, the area should be reduced to what was really authorised. Clearings of this sort are also made, not directly for cultivation, but for herding cattle (in the North-West Himalaya such clearances are called "tách"); in this case it is impossible that they can be the subject of any permanent right in the soil; and the allowance of any interest in them will rather depend on the arrangements made with reference to grazing rights, than on any right to the soil cleared.

stances are such as justify some leniency; here probably the unauthorized holder would have to go, but *a solatium* might be granted in the shape of a money payment (not of course a regular compensation).[1]

If the claim is allowed, then either—

(1) it will be bought out by consent or under the Land Acquisition Act, or

(2) will be exchanged, or

(3) let alone.

*Ad.* (1) Compensation proceedings in the case of small plots, are usually settled by the F. S. O. on the spot; as no one will desire to have a lengthy or complicated procedure, consent is sure to be attainable. But the Forest Act makes due provision empowering the F. S. O. to act under Land Acquisition Law, as stated in sec. 10.

*Ad.* (2) Exchange is often easy to effect, especially when there are several small scattered plots, which will gain (or not lose) by being aggregated together just outside the forest, or on an adjacent bit of available land.

*Ad.* (3) More rarely, the plot—especially one which it would be costly to expropriate—will be let alone inside the forest: in that case, it constitutes an 'island' in the forest, not subject to the Forest law. It would, of course, be measured and clearly demarcated and recorded. Such an enclosed plot would involve (as of necessity) a right of way and probably cattle-way, to get to it.[2]

When a considerable plot of cultivated land is left in this manner, though it has certain disadvantages to the Forest, it is not wholly to be regretted. For the land will probably have resident cultivators, and these may be glad, at slack times, to furnish labour (for hire) in the Forest,—labour which might otherwise not be available; and the cultivators may be made friends of, and really turned to be helpers and protectors of the Forest.

[1] Or he might be allowed to hold on for another year or two; and in any case he will be allowed to retain possession till an existing crop comes to maturity and is harvested.

[2] It would always be held in such cases that the owner had a right of way to his plot, and the right would include a way for cattle or carts according to the nature of the locality and the circumstances of the cultivation. You could not in the nature of things, have a plot of land from which you could derive no profit by reason of want of access. This point is expressly ruled in the Italian Civil Code (Art. 593), and in the French Civil Code (Art. 1018), see also Curasson (I. 331), and so in English law, Kerr's Blackstone, Vol. III., pp. 35—36 (London, 1857); Williams, p. 322. See also the Indian Easements Act, 1882, secs. 13, 14

**(B.)** and **(C.)** Having disposed of claims to land, the next work is to settle *easements* comprising (1) rights which are of the nature of 'easements' in the old (English law) sense of the term—*i.e.*, rights of way, rights to water, or the flow of water, drainage and the like; and (2) rights to take or utilize some of the forest produce.

The Acts proceed to deal with these rights in a certain way which I will here only state in general terms:—

**(1) It is required that every effort shall be made to find out what easements exist: and it is finally declared, that, in the last resort, rights not claimed or discovered, *cease to exist*.**

**(2) It is required that a record should be made giving the names of holders of *personal* easements; and the names and particulars of *real* easements, and the estates or Institutions to which the latter are appurtenant.**

**(3) The rights must be brought to *definition*, that is, an authoritative decision is to be given as to what is the *nature* and *extent* of each.**

Now before we can examine the details of this *definition* and why it is required by law, we shall have to consider in detail some matters which in my elementary lecture on the subject of easements (regarded as rights over Things, p. 79), could only be indicated in outline. In order, however, not to break our present subject into portions, we will leave these matters for the present, and assume that all easements (of one kind or another) have all been defined under the law: thus we can proceed at once to consider the further steps which still remain to be taken in order to complete the Legal establishment or constitution of the Forest.

Assuming then, that the F. S. O. has heard the parties and come to a decision as to the justice of the claim and as to its extent, and has put down all the necessary particulars coming within the scope of *definition;* the next question is, what is he to do with the rights? This will depend on whether the easements are of class **(B.)** or **(C.)** (p. 262). If the former, the record and description is probably all that is possible or needful; for they will be mostly *necessary* rights. A special power is given to deal with *roadways;* but that will be considered hereafter. No other provision is made in the Act (secs. 11–15). In the case

of the produce-rights (C.)—which are what really give trouble—the F. S. O. can do (sec. 14) one or other of three things :—

**(1) Transfer the right to some other convenient locality, or to part of the proposed forest, *excluded* for the purpose, from the area to be made subject to Forest law.**

**(2) Admit the right to *exercise in the forest itself.***

**(3) Get rid of it by buying it out for a *compensation.***

Sec. 14 enables the F. S. O. to consider whether there is any other *Forest* tract of sufficient *extent* (and of course of a character or nature to support the rights) and in a "reasonably convenient" neighbourhood.[1] This place may be either a separate (available Government) Forest tract, or *part* of the area, to be cut off and excluded from the proposed forest. If the rights can be so provided for, the actual forest to be reserved will be free. On this, two remarks are necessary. (1) This process it will be observed, is not at all the same as the French law of "cantonnement," and (2) the Act does not say exactly what is the legal position of the portion "of sufficient extent, &c.," on to which the rights are transferred.

As to the point (1) ;—under the French law, "cantonnement" is purely a form of compensation for a right which is thereby extinguished. A piece of the Forest is taken, of such a *value* that it represents a property equivalent to the value of the right ; the right-holder gets this bit of forest, as absolutely his own to do what he likes with ; he may clear it, and cultivate or not, as he pleases. The Indian rule now under consideration, is quite different ; the right is not valued, nor is it extinguished as by compensation ; it is simply taken (as it is defined and admitted to record by the F. S. O.) and transferred to another place.

As to (2) the legal position of the area on to which the rights are transferred, it must be observed the Forest law in India, as I shall afterwards explain, belongs to a period when matters were in an elementary stage, and it would not have been practicable to go into too much detail before practical experience had been gained as to the provisions really necessary. Hence nothing is said about the

[1] *E.g.* cattle could not be taken to a grazing ground many miles away ; wood-rights could not be exercised on a place so far away, that carriage would be laborious or costly ; if it were a right to large wood for building, it could not be transferred to a tract that grew only bamboos or small wood ; if on the other hand it were a grazing right, it would matter but little what sort of tree growth (if any at all) the forest tract had—it would suffice if there was proper grazing.

management or ownership of the piece of land or Forest on to which the rights are transferred. In some respects the provision of sec. 14 (*a*) and (*b*) which are repeated in all the Acts (*e.g.*, Madras, sec. 12) may give rise to future trouble. It may be presumed that, practically, care will have been taken to see that an *undue number* or *extent of rights* has not been turned on to the excluded or the alternative "Forest tract," *e.g.*, that more cattle have not been assigned to the selected place than (in the long run) that place will really support. If any mistake is made as to this, the rights will gradually perish from failure of the place to satisfy them. The Act nowhere says, it will be observed, that the selected (alternative) tract becomes the *property* of the right holders in any way; it still remains the property of Government (as it must have been originally, otherwise the F. S. O. would not have been able to deal with it). But the Act is silent as to whether any steps can be taken to look after it so as to ensure its being worked properly in the interest of the right-holders placed upon it. I think it would be held, that as the tract does not cease to be Government property and is not made over absolutely to the right-holders, the Government, in principle, has still the owner's right to maintain in safety the "substance" of the tract; *but, that looking to the express object of the arrangements made*, the Government interference with the tract would be in all cases limited to measures for the express promotion and preservation of a continued beneficial exercise of the rights. Unless, however, some special steps were taken, the area excluded, would *not* be subject to the provisions of the Forest Act:[1] though it would remain subject to the general provisions of the ordinary law applicable to Government waste land. I conceive also that there would be no legal objection to settling all rights upon a given area of ground (without resorting to sec. 14 (*a*) and (*b*) and then making the whole over (under management) as a "Village Forest." It is only possible in the present state of things to call attention to the difficulties arising on this head, and to suggest what is at least an equitable mode of meeting them.

But to return to the Forest Act itself: if the rights cannot be provided for either in a separate tract, or in a portion cut off and excluded from the limits of the proposed forest, the rights may be provided for by "recording an order" that the rights as *admitted*[2] *and to that extent* (*i.e.*, as defined), are to be con-

[1] It would be quite within the authority of the Act, to take further proceedings and *constitute the place itself* a "Reserved" or a "Protected" forest—of course in such a case with the *sole* object of making it fit for the *continual* exercise of the rights.

[2] As already done, with reference to names, numbers, quantity, etc. under sec. 13.

tinued in the Forest itself—but observe (sec. 14, *c*)—*subject to regulation*, which (as the next section shews) has reference to the "due maintenance of the forest." This *regulation* is such an important matter that all details are reserved to a separate lecture.

I will therefore at once pass on to the next section (sec. 15). If the F. S. O. looking (i) to the ensuring of a *continued* exercise of the right *to the extent admitted*,[1] and (ii) duly regarding the maintenance of the reserved forest, finds that he cannot provide for a proper "settlement," he is then to *buy out* and *commute* the rights and so get rid of them.

In the Burma Act, rights are so few and so simple, that it was enough for the section to say "if the rights *are not provided for*" in one or other of the ways stated, they are to be commuted; and the *Madras* Act follows this wording, adding a power of Government to make rules on the subject of the F. S. O. commuting rights. But in any case it is obviously consistent with equity and with the general principles of law, that *both* the right of the forest-owner to a normal management of the estate *and* the interests of the right-holder, should be looked to, and not only the latter. The question is—given a right defined as to its nature and extent, is it possible by making fair conditions as to its mode of exercise, to let it go on in the forest, so that the right may be capable of *continuous* enjoyment, and yet the *forest be duly maintained?* To judge of this question, the F. S. O. will have recourse to the Forest officer's opinion and to the reports and other means of information as to the extent and capabilities of the Forest. It is a matter that will require both careful inspection and full consideration. But in the end, the formal decision of the question rests with the F. S. O. (subject to appeal). If the rights *can* be provided for, then they are admitted subject to the necessary *regulation*: if not, all that the Act itself provides is that the rights are to be bought out.[2]

[1] *Servitutes perpetuas causas*, etc. (p. 85): it would never do to provide for rights in such a way that in a few years they would cease to be obtainable.

[2] The Act as it stands does not allow such an objection as "I cannot help the "rights being heavier than you think the forest will supply:—there is no pro-"vision for *reducing* rights in excess of the capacity of the servient estate. The "rights must therefore be allowed in total; and if it is found that the Forest is "getting destroyed, it cannot be helped." This matter will be further explained hereafter.

Here, once more, I propose to leave the subject of the *means and manner of compensation*, to the separate lectures above promised, which will then deal with the special subjects—"The *definition* and *regulation* of Forest rights, and the mode of *compensating* or buying them out." This will necessarily be preceded by an (introductory) explanation of the relative rights and duties of the Right-holder and the Forest owner.

### *Procedure in Hearing Cases—Appeal.*

It was hardly necessary before, to observe that in discussing the claims of right-holders and the answer (if any) of the Forest officer, there is a proceeding in the nature of a suit, which may involve the taking of evidence, and the hearing of argument on either side. The right-holder is (practically) the plaintiff, and the representative of the Forest is defendant. The Indian Forest Act provides (in sec. 18) that the Local Government may appoint "any person" (it would usually be a Forest officer, but there might be an Advocate or a Pleader with him) to represent its interest and to take part in the enquiry.

It may be, that the F. S. O.'s order—whether on the subject of admitting a right (as existing at all), or as to its extent, or as to the mode of dealing with it under secs. 14, 15—may be unacceptable to one side or the other. Accordingly sec. 16 provides that any claimant, "or any Forest officer or other person generally or specially empowered by the Local Government in this behalf," may make *an appeal*. The Burma Act does not contain these words, but says merely "any person who has made a claim, &c." may appeal: and that includes a Forest officer who has made a claim on behalf of the Forest, as well as a right-holder who has made a claim on behalf of himself or his village or estate. The Madras Act (sec. 4) expressly empowers Government to appoint a Forest officer to represent the Forest interests, and (sec. 14) empowers this person to appeal.

An appeal must be delivered (in writing) to the F. S. O. within three months of the date of the order appealed against; it is heard, in Madras, by a special "Forest Court" (appointed under the Act) *or* by an experienced Revenue officer nominated

for the duty (sec. 14). Under the Indian Act, it is heard ordinarily by a Revenue officer not below the rank of a Collector or Deputy-Commissioner (District-Officer); and so in Burma. The Madras Act reverses the order adopted in Act VII.; in Madras the Forest Court is the rule and the other is the alternative; in the Indian Act, the ordinary appellate Court is the Revenue-officer appointed, and the Special Forest Court is the alternative. I have not heard of any case as yet, in which such a special Court has been appointed.

In the Indian Act (and so the Burma Act), the F. S. O. at the original hearing and investigation of the claims, has the *powers* of a Civil Court in hearing suits (sec. 8 (*b*)) and this perhaps implies that he will follow the *Civil procedure* in general, but nothing is expressly said on the subject. In the case of *appeal*, it is expressly said (sec. 17, 2nd clause) that the appeal will be heard in the "manner prescribed" for appeals in matters relating to Land revenue. This is no real difficulty: for the procedure in the first instance, will always be informal and equitable; and if the procedure in Appeal is revenue law procedure, the difference is rather verbal than real. In revenue cases (as provided in the L. Revenue Acts) the procedure is (usually) that of the Civil Courts, but somewhat simplified, and especially modified with regard to the *personal* attendance of the parties. It should be observed, however, that the rule often adopted by the revenue law to restrict the employment of professional pleaders, &c. (*i.e.*, without the Court's permission and with certain disabilities as to the costs) would be overridden in Forest cases, by the express power (sec. 18) of either side, to appoint "any person to appear, plead, and act" on his behalf. The Local Land Revenue Act would have to be consulted for details; but as a matter of fact the procedure is quite simple and offers no technical difficulties whatsoever.

The Madras Act has avoided this (not very important) difference. It expressly gives the F. S. O. in original proceedings the powers of Civil Court for compelling attendance of witnesses and producing documents; it says nothing about the general procedure at the hearing. In Appeal (sec. 14), the appellate authority has to follow the procedure prescribed in secs. 39, 40, which include the general provisions of the Civil Procedure

Code; there is also a special power to refer to the Presidency High Court for a ruling on certain points of law.

*Revision by Local Government.*

It will be observed, that the Local Government has still a double power (independent of the appeal procedure) of revising any arrangement made under sec. 14, or on appeal (secs. 17 & 21). Under sec. 17 it can revise and modify (in any way permitted by law) the appellate decision. But further, sec. 21 gives a power subsequent, which only extends to directing that any one of the modes specified in sec. 14 may be substituted for that adopted, or that the right be commuted. This power may be exercised within five years from the date of the *final* notification of the "Reserved Forest;" and would be exercised (naturally) *after* some experience of the existing arrangements, when it appeared (within the five years) that it was working badly.

*Growth of New Rights or Easements—Concessions.*

Sec. 22 is a useful protection against the further burdening of forest estates, and the growth of rights which might leave the forest almost valueless in the hands of the generation to come. We cannot help the existence of rights that have grown up by prescription in the past; but we can and ought to prevent such growth in the future. No new rights can grow up, and consequently no practice that was (so to speak) on the way to complete its prescription, can accomplish it: the period ceases to run.

I may take occasion here to remark that cases have occurred in which an attempt has been made to record rights so as to admit of new households and new cultivators (in the future) being provided with the same rights as have been recognised in favour of the old inhabitants of a village. I cannot tell how the authorities may actually decide, but I must insist that legally, such a provision is directly contrary to the plain meaning of sec. 22, and ought to be resisted,[1] but I shall reserve some further remarks on this subject, which will be better understood when we come to the details of 'definition.'

It may be convenient in this place to notice that while new

[1] It cannot be urged that there is any hardship. It may be desirable to see

rights cannot grow up by any process of prescription, Government can by *specific grant* under this section, *create* such rights. It is, however, in most cases unadvisable to tie the hands of the public authority by granting a right, which, once granted, is irrevocable. When it is desired to make provision for some *hard case*, it is better to grant a "concession" or "license"[1] worded so that the Government may at any time revoke or alter the terms. When such a permission (which the French call "*tolerance*") is granted, it should define the number of cattle to be grazed, the kind, the season of grazing, the quantity of wood, and in fact all other particulars exactly the same as would be done in the case of a right regulated for exercise inside the forest. There might, perhaps, be a (nominal) annual charge made for the exercise, simply to mark its character as not being a right: its nature should be clearly explained in the order, and it should be declared exerciseable subject to the control of the Forest officer, and to be terminable in case of any breach of conditions. The French practice in this matter may be usefully mentioned.[2]

A concession for the convenience of certain persons, which is not intended to be a fixed right, is conveyed by a written instrument holding good for *nine years*, and stipulating that the concessionaires shall pay a *nominal* rent or charge which prevents the idea of a permanent grant of a right. It can be renewed as often as the authorities please, at the close of each ninth year. The Préfet grants these "*tolérance*" with the advice of the Conservators. The conditions attached are—

(1) that the concession is always revocable at pleasure (and cannot militate against any pre-existing rights of third parties, for which the Government is in no way responsible);

(2) The term of years (nine or some less number) is fixed;

(3) The yearly charge is to be paid (as above stated);

villages increase and grow, but newcomers have no more right to expect that they will have new burdens created on the forest in their favour, than they would have to expect any alteration of other natural conditions of their location. They come to the place with their eyes open, and if the absence of forest rights would make the position intolerable, then in common reason, it is better that they should stay away. The proper way in any case, to meet the wants of new villages is not to impose legal burdens on the State forests, but to create village forests for the express purpose of satisfying such wants.

[1] Sometimes called "privilege." As to the objections to this term, see note at p. 281.

[2] See Service Administratif des Chefs de Cantonnement; par. A. Puton (Grosjean Nancy, 1870), p. 198, &c.

(4) The concessionaire is responsible to make good any damage caused in the exercise of his concession:

(5) When the concession comes to an end (in whatever way) the grantee engages to restore the locality to its original condition, whenever that is necessary, within a month, or to allow the Forest Officer to do so and to pay all charges.

The concessionaire signs an agreement that he accepts the terms and will abide by them; and failure to sign this in due time entails cancelment of the concession.

In a few places in India, leases of bits of forest are sometimes given with a right to grow crops for a certain number of seasons, conditional on raising (in lines between the crops) certain trees. In practice these do not lead to much, as a rule. But the plan is also known in France (*concession à charge de repeuplement*).[1]

The subject of *licences* is not mentioned in the Forest Act because no legislative authority is required (cfr. p. 21). The grant of such permissive acts is solely a question of convenience.

The process of settling rights, and separating those of the State and those of private persons, being thus accomplished, all that remains to be done is to wait till the period for appeal has elapsed, and till all cases have been decided, and all procedure for acquiring any plots of land, &c., completed; and then a *final notification* declaring the area to be a Reserved Forest (from a date to be fixed by the notification) is issued. This clearly specifies the exact limits of the forest, either with reference to natural boundaries (where such exist) or to artificial marks to be erected, or by both means combined. The *Forest Officer* has the duty of seeing that this notification is translated (*i.e.*, into such local dialects as may ensure it coming to the knowledge of all persons concerned), and that the translation is published in "every town and village in the neighbourhood of the forest": this is in addition to its formal publication in the Official Gazette, and *previous* to the date fixed for the forest becoming legally a "Reserved Forest."

I might now go on to speak of *boundaries*, as being part of the proceedings for *constituting Forest Estates*, which are the direct subject of this lecture. No doubt, it is essential that

[1] See Service Administratif des Chefs de Cantonnement; par A. Puton (Grosjean, Nancy, 1870), p. 211.

*boundaries* should be fixed and conspicuous: Forest law can only take effect within perfectly defined local limits. If a man were charged with a purely forest offence, and he could prove that no such limits were clearly defined, and that therefore he could not know whether he was acting inside the forest or outside (the act itself not being "naturally" a criminal act, *i.e.*, wherever it was committed) this would, I submit, be a good defence. But on the whole, it is more convenient to speak of boundaries under the head of "Protection by Law." Still the student will remember that the fixing of limits, and the record as well as the erection, of boundary marks, is an essential part of the constitution of Forest Estates. Indeed, the final notification which is the summing up and completion of the whole work *could* not be drawn up unless the boundaries were perfectly definite.

The last point to be noticed is that when a "Reserved Forest," formally settled and constituted, has gained legal existence, the area of it *cannot cease* to be "Reserved Forest" without the express sanction of the Government of India.[1] It may be made over (under the Act as it stands) to be Village Forest under Chap. III., but it is still Reserved Forest and subject to all the laws of a Reserved Forest (sec. 26). If a forest with due sanction ceases to be reserved, the *rights* (if any) which have been disposed of as above described, *do not revive.*

These remarks bring to a close what has to be said on the subject of the Regular and Permanent Constitution of Forests.

It only remains to be added, that as the *definition* of each right is of the nature of a judicial decree which may or may not have been modified on appeal, and as any orders for *regulating* rights in their exercise within the Reserved Forest are also authoritative, it is necessary not only to be able to refer to the original record or "file" of each case (or group of similar

[1] It has been thought that this provision might be improved. It has (unfortunately) been necessary to resort to it in cases where, under a too hasty zeal for forest demarcation, areas have been unwisely declared "reserved." And perhaps it would be better to leave this matter in the hands of the Local Government, but to require that the "Reserved Forest" should only cease to be such—(i) where Government declares that the interests of the public in respect of the area demand the change in favour (only) of *permanent* cultivation, (ii) and that with the advice and on the report of its Chief Forest Officer, (iii) and never in the case where forest has a "protective character," *i.e.* against torrents, landslips, &c.

cases) which will be deposited in the Collector's District Record room, but to have a *tabular register*, to which reference can at once be made. Rights as allowed and defined, must all be entered, and a column should show how they have been disposed of—whether by transfer to some other tract; or left in the forest (in which case the particulars of the regulation ordered must be shown); or bought out by compensation. Such Registers, in strongly-bound books, ought to be available separately for each large forest—or group of forests—as may be convenient.

It is for the local authorities to provide the form, but I would suggest that it is not worth while *in this register* (which is intended to be compact and easily referred to) to enter the form of the original claim, where it differs from that ultimately agreed upon, nor any original order that has been modified in appeal.[1] It seems sufficient to give the orders, rules, &c., in their final shape—the only separate column that might be desirable, is one for any modification made by the Local Government under its special powers: this power would very rarely be exercised, but where it is so, it would be after the F. S. O.'s order has become final. The fewer columns there are in the form, the easier it will be to refer to. I should suggest some such form as this :—

Column 1. Name of estate, person, village, &c. (details as in sec. 12).
" 2. Number of houses and accessory buildings.
" 3. Population.
" 4. Area of cultivated land.[2]
" 5. Nature and extent of *cattle* grazing rights, specifying number and kind.
" 6. " " any kind of *wood*-right.
" 7. " " any *other produce-right*.
" 8. Detail of *regulation* ordered.
" 9. For any modification ordered (under secs. 17, 21).
" 10. For "Remarks."

I would suggest that a register giving any *rights in land* within the forest, and a register regarding *rights of way*, watercourse, or use of water, be kept separately. But local convenience will, in this matter, be the best guide.

[1] All these matters could be seen if necessary in the original records.
[2] If a record applied to a whole *village* it might be useful to state what (and what sort) of "waste" the village had of its own.

*Constitution of Protected Forests.*

It remains to notice the subject of the provisions regarding "Protected Forest" under Chapter IV. which apply only where the Indian Act is in force. That this procedure never can amount to a complete settlement, I have elsewhere explained (p. 235). Here I only state the law as it stands.

The procedure involves:—

(1) The issue of a *Gazette* notification, declaring the area subject to the provisions of Chap. IV. But this cannot issue unless a record of rights on the proposed area already exists; or, if no such record exists, an officer may (by implication) be appointed to make it; and though the result of his enquiry might be generally sufficient to satisfy Government as to the practicability of declaring the forest, it would not lead to any decision of extravagant, or undefined claims, nor would unclaimed or undiscovered rights cease to exist: no appeal could be made; and new rights might go on growing up; right-holders could not be prevented from selling produce (unless the Courts would hold, as they justly might, that this was against the nature of the right—apart from any express enactment of the Forest law).

(2) Action under sec. 29—which would be conveniently taken at the time, but might be taken at any time after issue of the notification.

This may (*a*) declare a class of specially reserved trees (which would not interfere with any *right* to such trees—only that such right is not likely to exist); (*b*) close for a term, a portion of the forest (and suspend all rights in it, subject to the proviso in sec. 29 *b*); (*c*) prohibit clearing land for cultivation, burning lime or charcoal, collecting forest produce (but this prohibition would have no effect against rights).

These prohibitions may be made and removed from time to time.

(3) Issue rules on the subjects stated in sec. 31.

The provisions of sec. 32 regarding penalties, are somewhat confusing; but I think the intention is to provide rules for

regulating the use, working, and taking produce from the forest generally, and that the rules should not be made to nullify the *prohibitions* declared under sec. 29. So that if the clearing of land for cultivation is prohibited (as it usually would be) the rules should not nullify this by providing that a certain permission must be obtained for cultivation. And so I take it, the rules to be made about collecting forest produce, burning charcoal, &c., are not to apply to cases where specific acts of this class have been expressly *prohibited*.[1] Similarly, rules about cutting trees would apply to all but "reserved" trees.

Between the *prohibitions* declared under sec. 29 (which avail against all *but* right-holders, and against those also in the closed portions) and the rules under sec. 31, no doubt a certain degree of conservancy is possible; but the success of the conservancy would depend solely on the rights being but few and the forest area large. In any case where numerous and extensive claims existed, and there was a demand for land for cultivation, it would be only a matter of years, how soon the forest was hopelessly ruined.

### *Constitution of Village Forests.*

There is no occasion to remark on this in detail. Under the Indian Act, the process is exactly the same as for constituting "Reserved Forest," only that in the end, the settled area would be (by a formal order) assigned to the village, or group of villages, intended to be benefited. Even under the Burma Act, where Village Forests may be constituted *ab initio*, the procedure is practically the same as under Chap. II. In both cases, however, the settlement of rights would be simplified by the fact that as the rights would presumably be those of the village for which the forest was constituted, the rights that needed settlement would be those (rarely existing) of persons or estates *other* than the village. The grazing, wood-cutting, &c., of the village itself would no longer be rights of the village over *another* property; they would become enjoyments of the

[1] Otherwise what would be the use of the prohibition? The property being that of Government, it is matter of general law and right, that its produce (except in virtue of an easement) cannot be taken otherwise than by express permission or the provisions of some rule. Hence where a special prohibition is issued under sec. 29, it would have no meaning, if the rules allowed the act notwithstanding.

estate now assigned to the village itself; and any regulation and definition, of number of cattle, season of grazing, number of trees to be cut, area of brushwood or small wood to be cleared annually for fuel, would become matters of the *working plan* (or scheme for the proper utilization of the forest) which ought in such cases to be prepared, whether annually or periodically. Except in the case of any rights of outsiders, the whole of the grazing on all open parts of the forest, and the whole annual yield of material, would go to the village, to be distributed by the village officers according to the proper proportions for each farm or holding—which would be recorded. And in the case of any surplus which was available for sale, it should be prescribed what is to be done with the proceeds, which ought invariably to be devoted to some common object,[1] and not to be distributed in small cash sums to individual villagers.

### *Effect of the Act on Special Forest Interests or Rights.*

No formal procedure is provided by the Act, under sec. 79, or in taking action in the case of interference (on the grounds of public safety) with Private Forest or Waste-land. In the latter case (sec. 35) a notification is required; and the notification will prescribe certain action to be taken. The interested party is also to receive a notice directing him to appear before an officer appointed for the purpose, to state any objections he may have to offer.

In the case of sec. 79, either the matter will be one of issuing certain rules only, or (more probably) will be that of applying the procedure, or part of it, under Chap. II. or Chap. IV.

[1] Such as the village school, mosque, temple, roads, bridges, official buildings, or even to help to pay the land-revenue.

# LECTURE XVIII.

## SPECIAL FEATURES OF FOREST-EASEMENTS; AND THE RELATIONS BETWEEN RIGHTHOLDER AND SERVILNT-OWNER.

THE last lecture explained that in regularly constituting a State Forest (under Chap. II. of the Act), all kinds of rights had to be ascertained; and, in particular, that "easements" were to be DEFINED, and their exercise (when admitted in the forest) was to be REGULATED; and that, in a certain event, rights of user (or easements) might be BOUGHT OUT by compensation.

Before we are in a position to understand the detailed steps which the Act requires (or allows) to be taken in pursuance of this provision, it is necessary for us fully to understand several preliminary matters. We have already, in Lect. VI. (p. 79) considered the general nature of an easement, servitude, or right of user; but we were not then in a position to go into the details we now require.

The questions we have to discuss before we can appreciate the details of Chap. II. of the Act regarding definition, regulation and commutation or indemnity, are the following:—

(I.) What is the legal basis of forest rights in India;—how did they come to exist?

(II.) How is it that rights need, and can legally and equitably be subject to *definition*, and must be exercised subject to *regulation*? For the provisions of the Act imply a certain *limitation* as inherent in the nature of these rights. In answering this question we shall have to consider more fully the nature of an easement, and to consider some important characteristics of this class of rights.

(III.) In doing this, we shall come to perceive that the holder of the easements has, in fact, a certain legal position which necessitates a certain course of conduct on the part of the forest owner;—conduct, that is, with reference to his mode of working and maintaining the estate so that the right can be fairly enjoyed; and on the other hand, the easement-holder has a corresponding duty to "spare" the forest—not to make his easement more burdensome to the owner

than is necessary; and of course not to destroy or over-tax the resources of the estate.

(IV.) *Vice versa*, the owner (with us, the forest-owner) has certain rights with reference to the easement-holders: he has the right to work and manage his estate in a certain way, upon which right the enjoyment of the easement cannot trench; he has also corresponding duties, namely, to manage his estate in such a way that it remains capable of satisfying the right or easement in a fair and reasonable manner.

The questions (III.) and (IV.) together, amount in fact, to a consideration of the relative position of the right-holder and the servient-estate-holder, with reference to their mutual rights and obligations. We proceed without further preface, to the first head.

**(I.) The origin and legal basis of Forest easements in India.**

In Lect. VI. (p. 86) I have already stated in general, that rights of easement or user in the forest, most frequently arose *in Europe*, out of ancient grants and charters, or at any rate out of definite customs of tenure; but also that they might be acquired by "prescription"—just as ownership itself may. No definite origin perhaps is traceable, but for generations past, the user has been enjoyed "openly, peaceably, and as of right"; then there is a prescriptive right or easement.

*The Waste land and the use made of it.*

In India, the ground for recognizing such rights is very rarely (but of course cases do exist) that of defined grant, charter, or official recognition in past days. Nor again, speaking *of strict legality*, can it be said that "rights" have been acquired by "prescription." It seems to me, strictly speaking, that if a "village" or a person, has been for ever so long in the habit of cutting grass or firewood, still if that was demonstrably done on sufferance, and because no one cared to interfere, and with the knowledge that at any moment, the local authorities could make over the forest-land to a grantee to clear and cultivate, and that (as a matter of course) the practice of grazing, &c., would then and there determine,—these conditions prevent, on general principles of law, the growth of a legal right;[1] the exercise was both

[1] It is not too much to say that if forest easements in India had to be established

"precarious" and (not "as of right"). but by permission or on sufferance.[1] That was really the condition of things under all Native Rulers of Indian States; and further, there was not under the later Princes, even any general acknowledgment of a right of property (at any rate to the humbler classes) in the soil of their own cultivated land,[2] much less did they contemplate any *legal* or fixed right of "easement" in the "waste." Still no doubt, the best native rulers were, in practice, careful of the convenience of the peasantry, because they knew that if cultivators and their cattle were not provided for, the revenues would fall off; so that practically, grazing and wood-cutting, in the then abundant waste and jungle or forest-land, were always allowed; and grants of land to cultivate would not, as a rule, be made so as to deprive a village of the necessary grazing ground.

When a Forest law was being enacted for India, it became a question how these long-established practices of using the Government waste—that now became State Forest, should be dealt with. It might have been held, for instance, that strict legal rights being hardly known, none would be recognized; and only provision would be made for allowing (with due liberality) certain concessions.[3] But it was preferred to waive technical distinctions, and leave it to the officials entrusted with the adjustment of

as rights of common have in England, two-thirds of them would not stand the test. You have always to show that either you and your ancestors, or you as the holder of a certain estate, and those who preceded you in that estate, had and still have, the right. A *custom* alleging that all *the inhabitants of a place* had a right of grazing, was held bad (Williams, p. 13), because there was an indefinite and fluctuating body, not that each person had a right as an ancestral one, or as attached to an estate which he held. Custom may be pleaded to establish a particular *incident*, to show what a right extended to; and copyholders can plead custom for a right in the manor of which they are tenants; but this is an exception (Williams, p. 194).

[1] In the Kánara case, Mr. Justice *West* remarked (p. 739) "the right arising from the State's eminent domain is not extinguished by its mere non-exercise; and its exercise was not called for till some public injury or inconvenience arose." The State is in the position, not of one who granted rights by implication, or suffered them to grow up adversely, but of one who knowing that he can interfere,—the other party acknowledging it also,—allows the practice to go on till the necessity for interference arises.

[2] See p. 211 (Government Property).

[3] Under all systems of Forest law, besides "rights" properly so called, it may be a matter of convenience to allow people—who would otherwise be badly off—to get certain grazing or wood-cutting privileges (see p. 272). These we call *licences* or *concessions*. They have sometimes been called "privileges," but this term as opposed to legal "rights," in English at any rate, is inconvenient; because in England "privilege" has a defined meaning, and really implies a strict right of certain kind, as when we speak of the "privilege of the subject," the "privilege of Parliament," etc.

questions of right in the forest, to deal with what they *equitably and fairly considered rights*—even though some technical requisites were absent. I think it may fairly be held, that what is practically a *right*, would be recognised in the case of all old-established villages long accustomed to find grazing, wood, &c., in the forest, and where they claim only what is really necessary for their farm work.

But there are many cases where it would fairly be held that (whatever might be allowed as of favour and on the ground of need and convenience) there was no *right*. For example, if a village has grown up on the edge of a forest within the last fifteen or only barely twenty years—it could not fairly be ruled that the inhabitants had acquired any *right* to graze, &c., in the forest; or again, if, when the Land Revenue of the village was brought under Settlement (as it is called), the Government had granted to the village, as its own, a sufficient area of wood and grass land, and since then the people have chosen to clear and cultivate the greater part, and so have got to rely on a neighbouring forest for grazing and fuel.

Even if it were a recent matter (as above instanced) the officer might still be guided by the greater or less *necessity* of the case —the people having nowhere else to go to; and it would become a question of equity and good conscience, under all the circumstances of the case, whether to recognize a right, or only to make a concession, *i.e.*, to grant *permission* or *license* revocable at the pleasure of the Government. But speaking generally, and of old-established practices, necessary to the well-being of the villages, I think the most satisfactory course is (as the Forest Act implies) to treat the matter as a case of *practically* (if not theoretically) *prescriptive right*. I beg that this consideration may be carefully borne in mind; it applies especially to Indian Forests; and will probably be found applicable in making Forest Settlements in the Colonies; *it is quite impossible* to deal with what are *practically* forest-rights, on the same strict principles as are observed on the Continent of Europe.

The fact is, that for ages past, no idea of the value of *forests*, as such, ever existed. The "Waste" was looked on as literally *waste;* the Sovereign or the local Chief always had the right to make a grant out of it to any one; and he often reserved

large tracts to himself for hunting grounds (called shikárgáh; and "ramná"—by the Maráthá chiefs in Western India). But until some such appropriation was made, the "Waste" was used by the people who happened to reside in the neighbourhood. Probably if there were some specially valuable trees like *teak* or *sandal-wood*, they would be called "royal trees," and none would be cut without permission or without payment of a fee (p. 207). In the old Hindu States of Oudh, I find mention of the Rájás levying an "axe-tax" (*tangaráhi*) in the forest. No one then thought of defining or asking whether the villages had a "right" to graze, and whether such "rights" were "in gross" or were "appendant" to the tenement or estate. At best there was an indefinite sort of understanding, that certain localities should be left as "jungle" for grazing and wood-cutting. In modern times, when it became necessary to provide for such useful and long-established practices on a legal basis, it was thought best to deal with them as if they had been regular prescriptive rights, and not try and draw any fine distinctions. But in so doing the law provides (and with more than usual reason) that the "rights" thus liberally conceded, are to be restricted to what is just and proper on principles of general law. No right, for example, to burn the forest[1] or do any *destructive* act, is recognized in any case; and also rights are not allowed to remain unlimited or indefinite; they are to be recorded within definite limits, and confined to the person (or estate) as well as to the purpose, for which they were intended (p. 291), and they are to be exercised subject to fair regulation. The nature and extent of these limitations we shall consider hereafter; at present we must pass on to notice the second head.

## (II.) Special features of Forest Easements.

This involves some details about the nature of forest rights.

In making the remarks which now follow, I assume that you will bear in mind what was said in our elementary discussion of principles (Lect. VI., p. 79), regarding the general nature of rights of user, or "easements" (in the widest sense). And you

[1] The rules about burning the forest (for shifting cultivation) are stated in detail in a later lecture.

may recollect, that I then expressly reserved some matters for consideration, because they were of too detailed a nature to be included at that early stage.

Let me first recall to your mind—what has been already stated—how on the Continent of Europe, easements in the forest are almost *always* regarded as "real" rights, *i.e.*, attaching not to the person but to some estate; but in India (and probably in our Colonies) we have not been able to adopt so sharp a distinction. Forest rights will often be found to belong to *persons*, who may not represent any "dominant estate" in the sense of a particular land-holding, or house or tenement. To use the English law-phrase, forest rights will sometimes be "in gross," and not always appurtenant to an estate.[1]

Further it was remarked that forest rights always implied some use or enjoyment which would have belonged to the owner himself, were it not (by the effect of grant or prescription) "broken off," so to speak, from the enjoyment of the latter and given over to another party (the holder of the right or easement). But though rights of user (easements), may be conveniently thus described, it is important not to mistake their real nature. They may constitute *in themselves*, a property, because they have value—often a high value; as appears when they have to be bought out or compensated for—yet they do not constitute the right-holder in any sense a co-partner or sharer in the ownership of the soil or of the forest itself; nor does the exercise of any number of different rights together, for whatever length of time, constitute the right-holders collectively, owners or part owners of the servient estate. One of the special matters that has to be further considered, is this *difference between servitude and ownership*. It is because the right-holder is not in any sense a part-owner, that he has only his right and no more; he must therefore

[1] Even in India, for all I can remember to the contrary, rights of user in the forests, though by no means strictly attached to a definite house, tenement, farm, or landholding, or to an Institution, as a school, college, monastery or temple, are yet *analogically* so connected. It will be rarely, if ever, that a person (not a mere lessee or contract-purchaser of produce for a time) is a permanent right-holder, *absolutely* as the individual A. or B. It will be the case that he is holder, *because* he is a permanent member of such and such a village body (whether as a tenant, co-sharer, or resident-artificer or menial), or because he is a member of a body or caste of cattleowners, whom custom recognizes as moving, in summer and winter respectively, to one or other locality. In all these cases it may be plausibly argued that there is some character, other than that of the mere physical being, that accounts for the existence of the right.

exercise his right in such a way as not to attack the substance of the estate itself, or prevent, unnecessarily, the enjoyment of it by the owner.

It is extraordinary what loose and inaccurate ideas on this subject sometimes prevail. Supposing that (in India) a forest is situate where there are several village-groups in the vicinity, and that a very considerable number of villagers have been in the long-continued habit (1) of cutting trees for their house-building, (2) of grazing cattle, (3) of cutting brush and small-wood for fuel, (4) of raking up the dead, decaying leaves and humus for manure, (5) of collecting leaves or lopping twigs for fodder, (6) of gathering herbage, moss and grass, for litter. People sometimes talk as if, at any rate, the *collective amount of these rights* made the people owners of the forest. This is entirely a mistake; the ownership of the forest still remains in the State or in the landlord, or whoever it is that, under the circumstances of the case, and in the progress of time, is or has become, the owner.

It is not, however, altogether to be wondered at that such a notion should be entertained; for a similar view came into prominence in Europe during the French Revolution. PROUDHON, a lawyer of great repute, actually succeeded for a time in arguing that the *usagers* or right-holders were co-owners in the forest, and therefore that they might demand the *partition* of the forest so that each household, or group, or individual (as the case might be) should, in virtue of his right, have a little bit made over absolutely to him. Thus it was that in 1792[1] a law was passed; and under it the State Forests were rapidly divided out and would have disappeared altogether, but that, fortunately, times changed. In 1827, the *Code Forestier* put an end to such a mischievous doctrine,[2] by declaring that the method of

[1] See Dalloz et Meaume *Répertoire de Législation*, Art. "Usage," sec. 237. See also Meaume, Vol. I. sec. 7.

[2] In justice to Proudhon it should be remembered, that he never held in the abstract, or in principle, that a right-holder who was really such and nothing else, could be regarded as a sharer in the estate; he was far too great a master of legal principles for that. But he was an impassioned advocate of the rights of the peasantry long trodden down by the aristocracy; and what he meant was, that the peasantry *then* appearing only as "usagers" or right-holders, were in reality the original "common-owners" of the forest, who had been reduced in *status* by the oppression of the Crown and the nobles; and that therefore it was time to re-assert their original rights. Even if this view of the case had been wholly true, it would still be a very questionable proceeding to legalize the wholesale reversion of a long-existing state of things, by enquiring what it had *once* been—perhaps centuries ago. If we did not allow a practical prescription to establish the *status quo*, whose land or house ever would be safe in his hands? In India, it is quite

satisfying right-holders by "cantonnement," *i.e.*, by cutting off a bit of the forest and handing it over absolutely to the right-holder, was *not* demandable by the *usager*, but only by the desire of the State or other forest *owner*.[1]

The new law was passed by the Chambers *without a division*, and the Reporter on the bill, in introducing the clause—and neatly expressing the principle we are considering—said "How can we acknowledge a co-proprietary character in the case of the rights of an *owner* and those of a *right-holder* . . . . ? So far from the idea of a right of user in the forest (which is only a kind of limited "usufruct") carrying with it any idea of ownership in the soil, it excludes rather any such notion, for the right of user is essentially a right over *the soil belonging to someone else*."

In India, this matter has received judicial discussion in the well known Kánara Case[2] before alluded to. The claim of the plaintiff to be owner of the forest, was largely based on the exercise of certain practices or "rights"—if we choose to call them so—of temporary cultivation in the forest; and it was decided that these or any other forms of enjoying some of the produce of the forest, did not make the right-holder an owner, or deprive the State of its undoubted right of ownership in the soil. Indeed the Indian legislature acknowledges the principle fully, for in the legal definition of "easement" it will be found more

impossible for any one who knows anything of the history of tenures to argue that waste or forest land was ever the property of any one but the local Chief or the Raja (or the Mughal Emperor in later times)—unless it was expressly or impliedly *granted* Wherever such a grant appeared, even by implication, the waste or forest was always included as private property, by the proceedings of the Land Revenue Settlement Wherever there are areas of forest in India, either "reserved" to the use of the State, or kept as other kinds of forest, it is always in lands that have *not* been included in any private estate Hence the user of villagers, can never, on any reasonable historical grounds, be represented as a relic of an *ownership* once recognized, or as a degraded form of a once proprietary right.

[1] *Code Forestier*, Art 63

[2] In this case Mr Justice WEST remarked :—"The mere fact of 'having made temporary use, or intending to make use actually or potentially, of a particular area or parts of it, is not possession' giving rise to proprietary right (p 581). And again 'should it be considered that the plaintiff had established a right * * * * to have *kumri* cultivation carried on in certain places, such a right would not involve general ownership in the soil (pages 513 and 514) This is no doubt the correct doctrine, and I think the learned Mr Joshua Williams must have a moment forgotten the distinction between acts which may give rise to a claim to a servitude or right of common, and those which amount to taking possession of the soil, when he wrote his remarks on the case *Tyrwhitt* v *Wynne* (Williams, page 155)." The learned author also quotes another case, which is directly against his own remarks, and supports what is stated in the text.

than once, that the phrase employed is, that one person is "entitled to appropriate for his own profit any part of the soil (or anything growing on it) *belonging to another*." A right-holder, if a *co*-owner, would not (as it is put by M. Favard de Langlade in the quotation above) be enjoying anything on the estate of *another*, but taking something on what was (in part) his own estate.

I need not here go into further authorities on the subject.[1]

It will be remembered then, that rights of user, however much they may inconvenience the owner, however much they may diminish the practical value of the estate, still always leave the right of ownership intact.

It follows almost necessarily from this consideration, that the right of user or easement is always a limited one; it can never extend so as to destroy the servient estate; and must be exercised "fairly" (*pfleglich—civiliter uti*) so as not to deprive the owner of all practical benefit from his estate, or prevent his working it in the usual and proper manner.[2] Even where a person had that larger right to *all* the produce which is called the "usufruct"—and ordinary easements are of course much *less* than that—the right-holder was still bound to exercise his right *salvâ re substantiâ*; or, as it is also expressed, with the moderation and care which a prudent owner or *paterfamilias* would observe in enjoying the produce of his own estate.

It is true that this phrase—*salvâ re substantiâ*—has been otherwise translated; some say that it means that the right exists "so long as the (servient) property is safe or continues to exist; and they consider that this is the better meaning, because the text[3] goes on to say that if the (servient) estate ceases to exist, the right ceases with it. But the meaning I have adopted, is given by nearly all the most

[1] Some references may, however, be given. Thus *Cooke* (p. 5 and especially pp 43–45) in speaking of a person having a certain legal right, says that he has a "joint interest in the soil, *which a person having a right of common* (easement) *has not.*" See also *Williams*, p. 190; *Hannoverische-Landes-Oekonomie-Gesetzgebung* (Hanover, 1864), p. 12, § 51; Qvenzel (Law of Saxony), p. 180; Bluhme, *System des Privat-rechts*, § 201, etc.; *Pfeil, Ablösung*, p. 66.

[2] This is expressly declared in the Prussian Law (Allgem: L. R.: Olshausen, p. 256): and so, on the other hand, the right-holder is entitled to the exercise of his right, so that it is not obstructed (*verhindert*) or rendered of no effect (*vereitelt*). Mere restriction of enjoyment, or some degree of difficulty or restraint in exercising the dominant right in a particular way (so as not to burden the servient estate more than can be helped), the right-holder must submit to.

[3] Digest vii. § 1; and Justinian, Institutes. Tit. II. and Tit. IV. 1.

competent German authorities. We need not however discuss the question; for the principle is not dependent on the words of a Roman law maxim, but on the reason of things and the general principles of civilized law. Indeed, when we quote Roman maxims, as I have so often done, it is not because they are binding as if they had some kind of legal or natural force *per se*, but because they so neatly and succinctly express principles, that they have at all times been adopted by legal writers as a convenient way of holding in the memory, truths which are recognized by all systems of law. The limitation of the right does not then depend on any text of Roman law or its interpretation; for, obviously, a right over the estate of another person, presupposes not only a continuing right, but a continuing estate;[1] and an estate could not fairly be said to continue, if it is year by year deteriorating by abusive exercise of rights—becoming less and less useful to the owner. On the other hand, the right would not be a continuing one[2] unless the owner (as we shall presently discuss) on his part, keeps up the estate in a condition to satisfy the right.

Here we have another reason why rights should be definite in extent and also regulated in their exercise. The "substance of the estate"—the forest itself would never be secure from permanent injury, if the extent of the right was not authoritatively determined, and if its exercise was not made subject to such reasonable regulations as will prevent abuses, and facilitate the due conservancy of the estate.

Generally speaking, it will be found that the principle of restricting the exercise of rights is essentially equitable, because by thus securing the maintenance of the (servient) estate, we shall really be benefiting *both sides;* the forest owner will be able to carry out the legitimate course of a proper management, and at the same time, he will be (really) making the best provision for the continued exercise of the rights or easements.

People, in India, often talk about the cruelty of restricting the rights of the poor people in the forest; forgetting that the right-holders are mostly ignorant of, and quite indifferent to, the simplest requirements of forest conservancy, and are naturally unable to see anything beyond the wants of the moment, and their desire to satisfy their needs with the least possible exertion or trouble. Sooner or later, if they *were* allowed to do just as they pleased, the forest

[1] *Servitutes perpetuas causas debere habent* (see p. 85).
[2] See note at p 85.

which supplies their wants would deteriorate, and eventually come to be a barren waste; of this India can show many examples. But unfortunately, the process of destruction being a slow one, the authorities sometimes refuse to believe that there is any harm being done by "rights" however unrestricted.[1]

### (III.) The Right-holder, what he is Entitled to, and what his Duty is.

The result of these considerations is, that both the easement-holder, and the forest-owner, have their mutual rights and duties.

The one has his easement, and can demand its equitably free exercise; the other has his estate, and can demand that he be not deprived of the use and enjoyment of it. Hence it will be convenient now to consider the practical relations of the interested parties. First, from the point of view of the *right-holder;* what he is entitled to, and what his duty is: and then from that of the *owner* (as our concern is with forest estates, we will at once speak of the forest-owner) what *he* is entitled to, and what *his* duty is.

Let us first look at the easement, and what it implies from the right-holder's points of view. First, the right has a certain *sphere* or *scope, i.e.,* it has:—

(1) A *subject*—wood (perhaps of a certain kind) for building or fuel, resin, grass, &c.

(2) A *manner* of obtaining it—whether by cutting the grass, or sending in cattle to graze, cutting trees and brushwood, or taking delivery of wood prepared for use by the forest-owner.

(3) A *place* of exercise.

(4) A *time* of exercise.

(5) A *quantity or amount* (and, perhaps, certain dimensions of wood) to be taken.

(6) A *purpose* to which the produce of the right is to be put, (*e.g.,* to have wood for domestic hearths, but not for a forge or a factory, &c.).

[1] In Appendix A to this Lecture will be found a number of quotations from European authorities, on the subject of the limitation of easements, as inherent in their nature.

These matters, in some cases,—rarely in India and our Colonies—will already be defined and prescribed by the grant, order, or charter to which the right owes its origin.

If the sphere or extent of the right is thus definite, the right-holder is entitled, as far as possible, to have a full enjoyment of it, only taking care that his enjoyment is consistent with the *duty* which follows from the general nature of an easement, and which we shall speak of presently.

If, however, the right is not definite as to its nature and extent, then, as has already been stated, it can and ought to be made so. In India (and doubtless in the Colonies) we have mostly to deal with usages practically recognised as rights, and which are most commonly held by people wholly unacquainted with any principles of definition of their rights, or any idea of duty as right-holders.

A man, for instance, will claim in general terms "a right to graze his cattle;" he has a general idea as to what *kind* of cattle he can require grazing for, but has none as to what *number* will properly represent his right as a permanency; probably, also (as to *time*), he wants his grazing during the rainy season or during the dry season only; as to *locality*, he only knows that he cannot drive his beasts too far away from his home. Thus the question arises, what are the limits of the right according to its real nature, and how are they to be found out?

An *unlimited, indeterminate* right is obviously a thing that cannot be contemplated by any law, however simple and elementary. Because such a right would, by its mere indefiniteness, be incapable of being properly provided for, and would certainly prevent the orderly management of the Forest Estate.[1] It should not be forgotten that definition of a right is really in the interest of the right-holder; it secures his claim, and enables him to know exactly what he is entitled to. In this matter, the general rule fixing the limits of the right (which is throughout implied by the terms of the Indian Forest law) is one which

[1] In the English law (as well of course as in all Continental laws) this is recognized. Thus *Cooke* (p. 4) says that "an unlimited right—as for instance a grazing right for an unlimited number of cattle, whereby the whole of the herbage might be consumed—is impossible. It is contrary to the very essence of a right" (to have such an unlimited user), and the author adds that the law would consider it "not as a right but as a wrong." See also the Appendix for European authorities in general.

cannot fail to be everywhere acknowledged. The *need* or *actual requirement* of the dominant estate (or of the personal right-holder) is looked to; and that means the need according to the essential quality or character of the estate, or according to the normal occupation, *status*, and condition, of the person. Suppose, for instance, that a right of grazing is attached to a certain farm; the *need* (for cattle-grazing) is for the number and kind of cattle usually employed for working a farm of that size and kind; and not for grazing all the cattle which the farmer might (as an individual) choose to rear for his profit—with a view (say) to selling them for meat to an army-contractor. So, if a Burmese "monastery" has a right to fuel and bamboos, it is for the "poongyees" (monks) as such, and the monastery as such (wood for fires and bamboos for roofing, or repairs or utensils), and not for supplying fibre to make paper, or fuel to heat boilers, if (conceivably) such a factory were set up by the monks.

And the right being always for the direct need of a certain kind of estate in its normal working, or for a certain person in his normal condition or occupation, it follows that the right can never be separated from the estate or the person; it might indeed be sold so as to pass when the estate itself was sold; or it might pass by inheritance to the successor of the person; but it could not be separately sold, nor could the produce of it be sold, because that would (in either case) imply that the right was *not needed*, but was available for sale or making profit.[1] The prohibition in the Acts (sec. 23, &c.) of the sale of a right, or its product, is obviously based on the principle that a produce-easement is based on the *need* of the right-holder.

*How* we calculate the amount to be given under the head of *need*, we shall consider in another place, when we speak of the details of definition, in the next lecture.

While speaking of the *need* of a right-holder on his estate, I should call attention to the fact that very often the right-holder has *some* means of supplying the need *other* than the servient forest.

Farm A, let us suppose, requires 200 cattle for its normal working and maintenance; grazing for 200 oxen is then the "actual requirement" of the estate; but already A possesses a grazing ground, or rights of grazing in some other ground (called B) on which (as a

[1] See p. 323.

matter of fact) it has habitually grazed (say) 80 of the cattle; here the servient forest ought not to be called on for grazing for the *whole* 200. Some systems of law will at once deduct the whole number which, in fact, the *other means* of grazing does habitually provide for, and allow the "need" for forest grazing to be only 200—80 or 120.[1]

So much for the nature of the right in itself, as the right-holder is legally entitled to have it. Let us now consider what the easement-holder is *entitled to*, and what is his *duty*. We may assume that the rights are or have become, definite, and that they are to be exercised in a forest which is in fair condition, and is properly managed—in short, is not in any exceptional condition calling for special measures of restoration. The right or easement must then be enjoyed fairly, fully, and without putting the right-holder to serious inconvenience; but the right has always to be exercised so as not to destroy the forest nor overtax its resources, nor prevent its normal and proper management, nor in general be *more* burdensome to the forest-owner than need be.[2] The *duty* of the easement-holder may be shortly stated as that of "sparing" the forest, or "*Waldschonungs pflicht*," as Dr. Danckelmann calls it. This, from the nature of the (limited) easement, is the fair correlative to its enjoyment.

From this it follows that the right may be confined to parts of the forest which are reasonably convenient to the right-holder, and not be spread all over it so as to interfere with all other work.[3]

[1] Other systems of law—but only under appropriate circumstances—prefer what I may call the "proportionate mode of deduction." This compares the grazing *capability* of the servient forest (=F) with that of the other available grazing-ground (=B), and then says:—As B : F : : the number to be deducted on account of B : the number to be provided for in F.

Now suppose the capability of B (owing to its number of acres and power of growing grass, etc.) is to support 200 cattle: while F is inferior and can only support 150, *i.e.* B : F = 2 : 1½. Then farm A would be reckoned as having (approximately) 114 of its cattle provided for by B; and F would only be burdened with 86 (114 + 86 = 200 the total number).

[2] Merlin (Répertoire *v* Pâturage) says: "It is a general principle of Roman law, that '*servitus indefinite concessa, ita interpretanda est, ut fundus serviens minimo quam fieri potest, detrimento afficiatur.*' (A general right granted in unlimited terms is so to be interpreted that the estate shall be as little injured as possible by its existence.)"

[3] The Prussian *Allgemeines Land recht* expressly provides that where a right can be exercised equally well for the right-holder in more ways than one, that way is to be chosen which is least burdensome to the estate. And so (Theil I. Tit. 22, Art. 80), "Whoever has the right to keep and graze (*hüten*) his cattle

It is also a general principle (which follows directly from all that has been said of the nature of easements), that they can only be exercised with reference to the power or capacity of the forest to yield them. The French Law,[1] to which I have already alluded, says simply, that the "exercise of rights can always be reduced according to the condition and yield-power of the forest (*suivant l'état et lá possibilité des forêts*)." If it were not so, the right would be attacking the "substance of the estate," and, as Cooke puts it, would "be not a right, but a wrong."

It equally follows, however, that the right-holder can require the forest-owner to abstain from doing anything which would reduce this yield unnecessarily, *i.e.*, there must be no careless or faulty methods of management.[2] The owner must not convert his forest into fields or meadow land, and so forth; nor must he grant or originate new rights to the prejudice of those already existing. We shall recur to this subject when dealing with the duty of the forest-owner; here let us primarily keep in mind that the right-holder's enjoyment is always a *relative* one—it exists subject to the ability of the forest to support it.

I may here introduce a connected subject which is of practical importance. It usually happens that, in a forest, there would be no difficulty if the right of one person, or one estate, had to be allowed; the difficulty arises where several villages have all concurrent rights—the *aggregate* of which is more than can be justly borne or provided for, or is beyond the capacity of the forest to bear without deterioration. In such cases, I submit, that (unless there are some very exceptional circumstances) the principle to be adopted, would be to reduce all the rights proportionately; not throw the whole of the inevitable diminution on one. Under some systems, they look to the respective *dates of origin* of the rights, and hold that the later ones must be supposed to exist subject to the former ones, and that if these take up all the possible yield, the others must suffer. No

on the soil of another, must make use of that soil so that the owner of it suffers no damage in the substance of his estate, and so that he is not hindered in the usual cultivation and utilization of the land according to its nature."

[1] Code For. Art. 65, and so in Art. 112, 119. The same principle is declared in the Code Nap. Art. 627.

[2] In a paper of Dr. Danckelmann's I find it noted that in Prussia the "Obertribunal" has expressly allowed the complaint of a right-holder, on the ground of general mismanagement and neglect to cultivate the forest properly on the part of the owner.

specific provision of the law exists in India on this subject; I presume the most equitable rule (and that easiest of application) would be followed. No doubt if the failure of supply were directly traceable to the coming in of new rights, it would be only fair that they should be reduced before the older ones.

### (IV.) The Rights and Duties of the Forest-owner.

We may now consider the same matters from the forest-owner's side or point of view; what *he* is entitled to, and what the right-holder consequently must be prepared for; and what is the owner's corresponding duty as to how he is to manage his estate with a view to the right-holder having a fair exercise and enjoyment of his easement.

It may be said, generally, that the owner has (*a*) the right to manage and utilize his estate, with no more hindrance than is necessary; (*b*) the right to enjoy the produce along with the right-holder (*mitnutzungsrecht*): which means that the right-holder is admitted to share in the enjoyment of the produce of the estate, as required by his easement (whatever it is), but not to deprive the owner entirely of a concurrent enjoyment. Of these, the subject (*a*) is by far the most material, and we will take it first.

(*a*) An important question obviously arises when we come to enquire what is meant by "proper management" of a Forest Estate? For a Forest Estate, and especially a State Forest existing for the public benefit, is one which, in general, should be improved to the utmost; the Government may, for example, desire to improve the property by converting (wholly or partially) one kind or form of forest into another, *e.g.*, a deciduous forest into a conifer forest, &c. Again, there is a management which is more *ex*tensive, *e.g.*, looks to getting a certain quantity and class of produce over as wide an area as possible, without aiming at concentration or at a high standard of quality; and there is one that is *in*tensive, *i.e.*, aims at the highest cultivation with a view to producing only the most valuable timber, and that in the largest quantity per acre, and of the highest quality.

But, speaking generally, there is a natural character attaching to a forest (of course assuming that it is not in a

ruined condition); it is a "teak," or a "sâl" forest, or a "mixed forest;" and, as such, there is a normal management which will keep up that general character, not allowing any waste or deterioration, and improving the growth, &c., but still not altering the style of forest as a whole. And the general rule is, that rights must be so exercised as not to interfere with the "due maintenance" of the forest in its ordinary, normal state of growth and reproduction.[1] On the other hand, the forest-owner could not (without compensation or buying out the right) introduce, for his own benefit, a total change, which would cause the material for the satisfaction of the rights to cease. *E.g.*, suppose a fairly constituted beech forest, burdened with rights of pawnage or mast, *i.e.*, feeding pigs on the fallen fruit; then the owner could not[2] convert his *beech forest* into a *pine wood*, because it was more profitable to him.

And, speaking generally, the owner cannot introduce any such arrangement as would "hinder" or prevent the exercise of the right in a fair and reasonable manner. It may be that proper management will subject the right-holder to *some* restrictions which may be unpalatable or even unintelligible to him; but while this is unavoidable, he is still entitled not to have such cultural operations and form of treatment adopted, that a full and fair enjoyment of the right, according to its true object, purpose, and contemplated benefits, cannot be had. "Hindering," in short, refers to a real or substantial obstacle, not merely to making the exercise somewhat less easy, or convenient, or comfortable.

Dr. Danckelmann puts it in this way, that the forest-owner cannot change the kind of stock (*Holzart*), nor the ordinary course of management (*Betriebsart*), nor the period of rotation (*Umtriebsart*), nor change the destination or use, *i.e.*, convert a forest compartment into crop-land, or meadow (*Benutzungsart*). In short, the owner has a right to manage his forest as

[1] In the Prussian Land-Cultur-Edict of 1811 (§ 27) it is laid down that the exercise of rights cannot be allowed "to hinder that management and utilization of the estate which is usual (or normal) with reference to the character of the estate in question." As to the corresponding law requiring that the right-holder should not be unduly interfered with and his right "*vereitelt*," see p. 287, note.

[2] When I say "could not" I of course always mean—not without compensating or buying out the right, supposing such a step to be allowed by law, or to be agreed to.

it must be managed to keep it in a normal working condition, not as he would *like* to manage it, if he had only his own profit to consider.[1]

There is, however, one matter which closely concerns proper forest management. So long as the forest already consists of an established growth of a particular kind, that only needs a regular and scientific management to keep its relative age-classes in proper order, and secure its continued productiveness, there is no difficulty in understanding the duty of the owner in abstaining from such changes in the management as might prejudice various rights. It is also easy to understand (as I have already explained) that a normal and hitherto usual management, may be such as to keep the forest in a sound condition, and yet not be the very best, or most highly profitable to the owner. But suppose the forest is in a very poor condition (perhaps—as so often in India—caused by the previous unregulated and wasteful exercise of village rights) then the matter is not so easy. Restoration of the forest must be allowed, and the rights must be restricted so as to allow at any rate successive portions to be closed entirely for restorative treatment and complete rest: I think no one could object to that in principle.[2]

I think it quite certain, if the question practically arises in India or the Colonies, that no rights would be allowed to prevent a proper conservative management (including restorative treatment) of forest in its natural or normal kind.

This restricted right of management by the forest-owner is not agreed to by *all* European systems of Forest law.

It is asserted in some places, that rights of user can never extend to prevent that "scientific and thorough management of a forest, which has for its object the largest permanent yield of the most valuable kind of timber."

There is a good deal to be said in favour of this larger view of what

[1] As it is neatly expressed by Dr Danckelmann (II. 25) "*Kann nur wirthschaftliche Nothwendigkeit aber nicht wirthschaftliche Zweckmassigkeit*" be allowed to influence the management when an injury to right-holders is likely.

[2] Remembering that in the end, the forest management, *having been regulated with reference to the supply of the reasonable rights*, these rights will be much safer, and really (in the long run) better satisfied and enjoyed, than if the forest had been left in a bad and deteriorating condition. I believe I am right in saying that forests never *remain* in a bad condition, they are always (if not taken in hand in time) getting worse—slowly, it may be, but surely.

the forest-owner ought to be able to do For the most important forests are State property, and their enlarged income benefits the whole community The more a Government can get out of its Forest Estates, the less it will need to tax the community at large. If, for instance, the net forest income in India were so enlarged, the Government might be able to cover (say) its losses in exchange entirely out of the proceeds; it might be able to afford to remit other taxes, such as the special duties imposed of late years on the import of certain articles of general consumption. But, on the other hand, rights of user have often in agricultural communities, a very great local importance; and a forest is a *local* institution; have the (so to speak) distant public a better right to benefit than the residents in the immediate neighbourhood? Moreover, is it always economically wise to enlarge the production of *wood*, without considering the value of other products?[1]

To sum up briefly what has been said, I think we may safely conclude that under English rules of law, the limitation on the exercise of rights will be restricted to what is necessary in order to *maintain* the forest; *i.e.* to maintain it in the normal condition proper to a well-managed forest of its kind; and that the wider view spoken of would not be allowed, *i.e.*, a deep-reaching change which would destroy or seriously curtail rights, could not be undertaken, at any rate without first compensating or buying out the rights. When speaking of "conversion" I do not, necessarily, include the case of a change from coppice to high-forest, where this is done gradually, block by block, so that the rights do not really suffer, but can be provided for by a little adjustment.

(*b*) The other right of the forest-owner is to share, himself, along with the right-holders, in the enjoyment of the produce. In India, this is not a very practical difficulty. The forests we are mostly concerned with are either State Forests, in which the State very rarely requires to take the grass and minor products usually enjoyed by right-holders, or to send cattle in to graze along with the right-holders. The only case where the question of the "*mitnutzungsrecht*" might be said to arise (practically) was where a series of rights to timber would demand the whole "coup," *i.e.*, take up the *entire*

[1] As Dr Pfeil (one of the earlier writers on forest rights in Germany) puts it; it is possible "to increase the yield in wood, and yet to diminish the total yield of the forest soil regarded as forming part of the income of the entire nation."

yield, so that the forest expenses (proportion of establishment and other charges) would be a dead loss. Dr. Danckelmann lays it down in such a case—and I think this equitable principle must be admitted—that the owner has always a right to deduct *first*, at least enough of the produce to pay for the establishment and other expenses of the forest, and that the supply of the rights would have to be diminished so far as to allow of this, at any rate. There may of course be cases where a right is express, and, by the terms of its grant, must be satisfied before the owner has any claim; but such cases will but rarely occur.

After allowing for cases where (exceptionally) the right-holder has a preference, and those where the forest-owner can demand to provide for the expense of the forest, as a first charge, Dr. Danckelmann holds that the owner has always a concurrent right; the right-holder is to *share with him* not to exclude him. This position, however, is contested by other writers; and I do not think that for Indian or Colonial students the subject has any present importance: it must develop itself when occasion arises.

The right of the owner may then be summed up by saying that the easement takes away from the owner no faculty of action, or enjoyment of his estate, *except* what would interfere with the fair, reasonable, enjoyment of the defined easement. In other words, the forest-owner has the freedom to do—

(1) All acts that do not touch the easement in any way.
(2) Such acts as do affect the easement to some extent, but are still necessary for the "due maintenance" of the estate, and its normal working and management.

And be it remembered in the case of forests, that the "estate" is the forest as a whole;—not merely the trees or the soil separately; so that the "substance" of a forest would be attacked and not "duly maintained," if the normal arrangements for planting-up blanks, and bad places;[1] the care for a proper succession of age-classes in the growth; the choice of the kinds of trees proper for the soil, exposure, etc. of the different sections

[1] This will be understood in general: there may be cases where it is natural to the forest—and not incompatible with sound working—to have (or rather to let alone) open glades producing good grass, such as occur by nature or have resulted from some action long past. If there are grazing rights and the blanks are not dangerously situated, the trained forester would understand how to manage; this is a matter of detail which no practical person will misunderstand in applying the general principle stated in the text.

of the forest; the utilization of wood before it rots and decays; and so forth, where not provided for. As every well-regulated forest is provided for by a "*working scheme*," more or less detailed according to circumstances, it may fairly be said that the right of the owner always includes the carrying out of a *working scheme*. But this, in itself, if intelligently framed,[1] will have express reference to existing rights and to making fair provision for them. It is also important to observe that where a sanctioned working-scheme has expressly provided the quantity of timber, or the number of stems that are to be removed from the forest (fixing, *i.e.*, the annual yield of the forest), no rights can be permitted to create a demand beyond this yield.

The securing of *reproduction* being one of the most essential features of management, it is obvious that rights must not interfere with it; but here again it is always possible to do the necessary works, and to plant up blanks, etc., gradually, block by block, so as not to injure the easements.

It will always be found that rights can be confined to reasonable convenient localities; and that where the rights consist of collecting *humus* and dead leaves, or other acts which are naturally liable to do mischief, it will always be legal to insist on their exercise under supervision,[2] and with due precautions to minimize the damage they are likely to cause.

The corresponding *duty of the forest-owner*, may now be examined. While managing his estate in a normal manner, he must avoid all steps that would curtail rights unfairly. Further it has to be observed that generally the estate-owner must do all on his part that is needed for the fair-exercise of the rights.[3] If

[1] For this reason (among others) *working schemes* are always submitted for sanction and approval. It is obvious that there are various ways of arranging schemes of working: there may be good and bad schemes, a skilful arrangement will often make perfectly satisfactory arrangements for rights, duly regulated as to time, mode, place, etc., whereas a badly drawn one might not.

[2] For illustration, refer to the French *Code Forestier*, Arts. 79, 112, 120, etc.

[3] This may seem to go against the principle (*servitus in faciendo nequit*) before stated (p. 81). A servient estate, it is true, never has to do anything, but only to submit to the right. But that refers to *direct* action—as, *e.g.*, if the servient estate-owner were asked to sow grass or make meadows, or plant oaks, or beech trees, to yield acorns, mast, etc.—no such acts could be demanded by a right-holder. But the text speaks of *indirect* action;—the duty of so behaving or acting with respect to the condition of the estate, that it does not fall into a state which would nullify the rights. The duty of the estate-owner does not, *directly* affect the right, it *directly* concerns the estate itself, keeping it in a condition of repair and efficiency so that the rights can be exercised. And on

there is a right-of-way, the owner must keep in repair any bridges, culverts, etc.; and he may have to maintain a hedge or fence, so as to prevent cattle passing along a roadway, from straying. It goes without saying that where the right is to certain materials, the forest-owner must not remove them all himself. That does not mean, on the other hand, that he is bound to work improperly, so as to leave trees to rot and die in order that the dead-wood right-holder's sack may be filled; or that he is to neglect the growth of his forest, and not remove beech-trees (*e.g.*) when they *ought* to be removed, so as to provide more mast for a man who had a right to feed pigs in the forest.

I may again repeat that the estate-owner, while he claims to have a *right* to proper management and utilization of his estate, has also the *duty* not to be careless or adopt faulty methods of management.

I have only one point more to mention, which also depends on the inherent limitation of easements. You will have noticed the fact that, under certain circumstances, the Forest Act permits rights to be got rid of by compensation. In India the law only applies to public or State forests, but in other countries there are provisions of law which enable even a private owner, under conditions stated, to demand expropriation of rights.

We shall have to mention the circumstances under which the right arises, as well as the steps of the procedure for compensation, in another connection; here we only note, that the *possibility* of so dealing with rights (under certain circumstances) depends partly on the nature of the right, as a limited one, and partly on the question of public benefit, to which private interests must give way. If the rights are such, that their exercise is *incompatible* wiih the preservation and maintenance of the forest, it is obvious that one of two things must happen: either the rights must be maintained,—in which case they themselves will not permanently endure (for the source of supply will gradually deteriorate and ultimately cease to exist); or the

this subject I may remark generally, that when for the safety of the forest, the right-holder is required not to get his own wood, etc., but take wood cut for him and stacked; these acts on the part of the owner are not connected with the nature of the right itself; they are subsidiary modes by which the owner helps the right-holder (*Behalfe*) and at the same time saves his estate from injury.

right, as the lesser thing, must give way. The latter course is obviously the fair one to pursue; but then reasonable compensation is to be given to the right-holder. When one of two parties must suffer, the one that has the lesser interest should suffer first, but his loss is made as easy for him as possible by giving him a suitable equivalent. All that is necessary is to define the conditions under which such action is called for, and to secure the compensation being full and equitable.

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## APPENDIX.

THE following are some of the modern authorities illustrating and enforcing the principle that rights of user and rights to produce are always in their nature *limited* rights, and cannot extend to *destroy* the servient estate, or render its proper working and management and its profitable use impossible to the owner.

The German writers are particularly clear on the subject. The first passage I shall quote is somewhat long; but it expresses the whole argument so forcibly, and yet so justly, and in a manner so suitable to Indian circumstances, that I cannot curtail it.

"Exactly," says Dr. Pfeil,[1] "on the same principle that the owner of any property is obliged to use the same in such a way as not to injure his neighbours or endanger the welfare of the whole community,[2] must forest rights be exercised within certain limits. The State, then, is entitled, without paying any compensation, to reduce forest rights to such an extent, but to such an extent only, as the public welfare demands. Many—indeed most—forest rights originated at a time when either little value was attached to the forest, or when such small demands were made on it, that it would always supply the produce, however little care was bestowed on its management. The slender population found wood for its wants in superabundance, and nature unaided, readily replaced the small quantities of produce removed. The very few cattle that grazed over a vast extent of forest offered no material hindrance to the growth of the young trees; if dead leaves were removed for litter, it was in too small a quantity to do any perceptible damage. But soon all this was changed. When population increased, cattle multiplied, cultivation extended, and new industries were called into existence; and this resulted not only in diminishing the area under forest, but in taxing more severely the productive power of the area that remained. The pressure on a forest, which is used by all the inhabitants of a certain place or district, increases enormously when the population grows to three or four times its original figure. The forest is then called on to supply an amount of wood and other produce that would

[1] Pfeil, § 2, p. 4.

[2] The allusion is to the well-known legal maxim "*sic utere tuo, ut alienum non lædas*"—so use your own right as not to injure another man's.

exceed its possible yield even under the most careful management. It is hence unreasonable that the rights of outsiders should be exercised to such an extent as to make the maintenance of the forest and the reproduction of the trees impossible.

"When the increased population require wood and grazing for their very existence, it is the duty of the governing power to remove all obstacles to the cultivation of the soil, so that these necessaries may be produced in adequate quantity. Just as the State is required to obviate everything that is opposed to the most effective employment of labour, so that every inhabitant of the country, who can and will work, may be able to support himself, so must it secure freedom to every owner of land to employ that land in the manner most advantageous to himself and to the commonwealth.

"Accordingly, every one who exercises a right in another's forest must submit, without any claim to compensation, to such reasonable limitation as will enable the forest to be maintained as such.

"The devastation of a forest should, indeed, be preventible by any owner of his own free right; how much more so when such devastation is detrimental to the interests of the State at large.

"In mountainous countries avalanches and landslips may be caused by such devastation. Soil may be washed away by the force of water running off denuded areas; the lower lying estates may be covered with detritus, and dangerous floods may be caused by the sudden rising of mountain torrents. In sandy districts, forest destruction may not only produce dangerous sand-drifts, but may cause deterioration, to an enormous extent, of the culturable soil in the vicinity. Springs dry up; the climate becomes more rigorous in winter, and hotter in summer; there is no protection against storms (and forest is often in this respect an indispensable protection to agriculture): in short, forests provide the most necessary requisites of life, so that without wood, even the most fruitful country (how much more so in an inhospitable climate) would become uninhabitable.

"On the same principle, even an absolute proprietor of a forest must submit, in the public interest, to have the utilisation of his forest circumscribed so far as is necessary to maintain its existence: and if this is so, *à fortiori*, the person who has only a right of user in the woods, can be treated in the same manner. For there are many rights which, exercised without restraint and to the greatest possible extent, would be so destructive that no forest could survive them. Where numerous herds of all kinds of cattle roam through the whole forest, no young trees can grow up, nor can the material cut out be ever replaced. Where the removal of *humus* or surface soil is so extensive that even places full of seedlings are cleared of

dead leaves, pine-needles, &c., the ground will at last lose its power of nourishment, and, especially if it is by nature poor, nothing more in the way of useful wood can be grown on it.

"When trees, however young, are tapped for resin, they can no longer be got to grow up into timber of useful size. Consequently, it is not only the right, but the duty, of Government, to limit the exercise of forest rights to such an extent as the maintenance of the forest demands; and for this, as I have said, the right-holder has no claim to any compensation.

"This principle is undeniable, and is admitted on all hands. Every civilised Government has made it applicable to the protection of its forests."

So Eding:[1] "Just as it is true on the one hand that the owner of the forest must so direct its management that the right-holder may always have a forest in existence wherein to exercise his right, so it is true, on the other, that the right-holder has a corresponding obligation not to exercise his right in such a manner that the forest (which is the *perpetua causa* of his right) would be destroyed and the estate itself, in substance, injured.[2] He must, just as much as an usufructuary,[3] exercise his right *salvâ re substantiâ;* that is, without injury to the permanent yield-capability of the forest (*nachhaltigen Ertragsfähigkeit*).

"You cannot naturally expect an individual right-holder to impose this restraint on himself, and against his own interest; the injury caused by excess may be such as does not become fully manifest in the lifetime of one man; to know how and when to restrain the exercise of a right, requires an amount of professional training, not to speak of foresight and self-denial, which it is impossible to expect to find in the right-holder himself.

"The law has therefore stepped in and secured the existence of the forest by prescribing the regulation of the exercise of rights.

"The limitations imposed by law are mainly directed to this object, namely, that the forest-owner may be able to work his forest by regular progressive cuttings, and to close a certain extent of the area cut over, with a view to reproduction. In such areas the forest-owner may preclude the exercise of rights of user, until the trees have grown up to such a height that they are out of danger."

And Dr. Roth:[4] "A right to wood can only extend to the regular yield of a forest in its original or normal condition. To demand

[1] Eding, pp. 76, 77.
[2] See also the Prussian *Allgemeine Landrecht*, Tit. 22, Theil I, § 80.
[3] See p. 287, where I explained this.
[4] Roth, § 257, p. 263.

more would be to attack the capital or estate itself, and so contradict the essential idea of a 'servitude.' Rights to other produce must also be exercised within such limits that the 'substance'—the forest soil and growth—be not injured." [1]

The French authorities are no less clear. The Code (Art. 65) lays it down distinctly that rights can only be exercised to the extent which the state of the forest and its normal yield-power justify *L'exercis des droits pourra toujours être reduit par l'administration, suivant l'état et la possibilité des forêts.*[2]

Grazing rights can only be exercised in parts of the forest declared "*défensable*," that is, of such an age that the trees will not be injured (Code For., Art. 67).

M. Dalloz [3] says the same thing: "Consequently, forest rights can only be demanded within reasonable limits, such as a proprietor himself would submit to, when managing his estate as a good '*paterfamilias.*' No right-holder can ask the proprietor to let him have material in ruinous quantities which would compromise the future of the forest. And hence the law lays down (Art. 65 above quoted) that the exercise of rights must be according to the state and normal yield power of the forest.

"These are the limits of the obligation of the proprietor, as the personal wants of the right-holder are the limits of his right."

The author goes on to quote with approbation a passage from the famous jurist Merlin (Répertoire *s. v.* Pâturage, § 1, No. 17), who says: "It has been admitted by the legislation of centuries that such restriction shall be placed upon rights of user in forests, granted in general terms (or at a time when the value of land was not appreciated

[1] The Saxon law requires that all such rights should be exercised "with the least loss to the proprietor" (*Burgerlicher Gesetzbuch*, § 524), and by the "Mandat" (concerning forest rights) of 1813, in the same kingdom (see Qvenzel, p. 201), rights are subject to "such limitations that the property is not destroyed." Grazing rights are limited as described above in the extract from Dr. Roth's work (Mandat, §§ 7–8). The Bavarian law is practically the same (Law of 1852, Art. 23). Dr. Roth, commenting on this law, says: "the existence of an *unlimited* right is inconceivable, for that would be to make the right-holder the same as a proprietor." The Austrian *Forstgesetz* has similar provisions (§§ 8–9; Grabner, p. 201, &c.). Nor are rights to be restricted only to such an extent that the forest "*is barely kept alive:*" it must be so that the forest can be managed in a reasonable manner. See also, generally, on this subject, von Berg, p. 179, and authorities there quoted.

[2] *Possibilité* is the quantity of material which can be taken annually from the forest consistently with maintaining it in a healthy condition of permanently sustained yielding-power. Nor was this a novelty in the Code. An old Ordonnance of A.D. 1376 (Meaume, § 271) had nearly the same provision, which is repeated in laws of the 15th and 16th centuries, and in the celebrated Ordonnance of 1669 (although Proudhon, contrary to all the later jurists, attempted to give a different sense to the term "possibilité").

[3] Répertoire de Législation, Vol. 25 (Paris, 1849), Article "Forêts" (Cap. 15, Sec. 1, No. 1403).

as it since has been) as the conservation of these important public and private properties requires."

Meaume[1] has taken this principle for granted, and contents himself with showing its antiquity, and arguing that the limit is the state of the forest and its yield-power (*possibilité*), as judged of professionally.

The Italian law of 1877 (Art. 29) declares that no right in a forest subject to Forest law, can exceed the limits of a right of user as defined in the Italian Civil Code; and that is, that the right can only extend to the actual personal wants of the right-holder and his family;[2] and in Art. 34 it concludes by saying that where rights are exercised in the forest, they are to be subject to "regulation."

The English law, as might be expected, does not furnish us with authorities quite so distinct, because the State forests have not been the subject of direct legislation. Nevertheless, there is enough to show that the same principles are fully recognised. Thus Cooke,[3] speaking of grazing rights, says: "Rules for the protection *and limitation* of the right are among the earliest provisions of the Common Law;" and again: "It is contrary to the very essence of a right to turn out such an unlimited number of cattle by which the whole of the herbage might be consumed. * * * Such a user the law considers not as a right, but a wrong." "You could no more," the author goes on to say, "acquire by prescription such an unlimited right, than you could acquire a right to clip the Queen's

[1] § 271 *et seq.*
[2] Codice Civ., § 521.
[3] Cooke, p. 4.
[4] Cooke, p 25. Williams does not expressly mention the subject, but he quotes several cases which show that claims to indefinitely extensive rights of common are bad at law. See the case *Lord Rivers* v. *Adams*, Law Reports III., Exch 361; and see also an Indian case in the *Indian Law Reports* (Calcutta Series), Vol. IX., p. 698.

# LECTURE XIX.

## THE DEFINITION, REGULATION AND BUYING OUT OF FOREST EASEMENTS.

### I. General Reflections on the Subject.

WE are now prepared to understand the details (which I reserved for separate consideration) regarding the *definition* of rights, their *regulation* when admitted to exercise in the forest, and their *commutation* in certain cases. There is also another reason why a separate treatment of these subjects is desirable; and this I will first explain.

The adaptation of Western legislative methods to Indian topics—or in other words, the provision of Statute Law for India by Acts prepared by an English Legislature, is always a matter of some difficulty; but it is a difficulty which had to be faced at the outset. The security given by British rule, the increase of trade and the rise in value of land and labour that followed, produced their natural results; life, in the various spheres of agriculture, commerce, and industry, entered on a new phase. But an altered and advancing society has new interests and new rights and liabilities; questions of contract and commercial law, unheard of before, arise and press for a solution; different rights in land and new distinctions of landlord and tenant—owner and right-holder, come into prominence. The Courts and public officers generally, called on to deal with disputes arising on these subjects, cannot fulfil their functions without an authoritative guide; and the Legislature consequently had to devise Land Laws, Tenant Laws, Contract Law and the like—all of them more or less novelties in a country where previously, for centuries past, the will of a despotic ruler, more or less tempered by a reference to local customs or to ancient texts, had been the only standard of law.

When it became necessary to prepare a Forest law, the task of laying down the principles of a sound course of proceeding, was a novel and a difficult one. The attempt made in 1865 to frame a law, was unsuccessful; and that can hardly be wondered at. Even in 1878 the difficulty was still serious. If we look to the Indian Statute Book of some twenty or twenty-five years ago, we shall find it marked with

a number of what I may call "first editions" of laws—Acts which have been repealed or replaced by better ones. In these older Acts the subjects handled, could only be dealt with in a broad and general manner. Some simple and directly useful provisions were enacted; but many matters were left unprovided for, either because questions regarding them had not yet arisen, or because a basis for their practical solution was as yet wanting. These Acts served their purpose at the time; they were worked equitably and without any great demand (on the part of the controlling authorities or the public) for technical legality. But as time went on and the judicial machinery became more elaborate, the people became more eager to claim their exact rights; distinctions were keenly appreciated, and rival parties began to fight over their respective claims, and to find out what they could do, and what they could not. It then became necessary to fill up the outlines of the earlier laws, to obviate legal difficulties that had arisen in the course of their working, and to provide for many matters hitherto unregarded. Many topics of law (*e.g.*, Civil and Criminal Procedure, and the Land Revenue and Tenancy Administration) have been provided for by revised Acts of a more complete order, during the past decade. The Indian Forest Act still belongs to the earlier stage; it has not been found advisable as yet to make a new one. Consequently in forest matters, while we have certain general rules and principles laid down, many details are left unprovided for: and the answer to more than one question has still to be developed in the course of practical working—*solvitur ambulando* as the saying is. One way of getting things cleared up will be by decision of the Courts, and especially in appeals in connection with Forest Settlements. The Courts will be guided in such matters by sound equity and reason, *i.e.*, they will not decide on the first fancy that strikes the presiding officer, but on intelligible principles which can be justified by reason and by the authority of good law books.

The details required under the several heads of definition, regulation, and compensation of forest rights, are matters which illustrate these remarks. The bare outlines indicated by the Act often require to be filled in. The Act, indeed, sometimes gives such indications that the details can be logically inferred; but still we often have to suggest practical rules which are not directly stated in the sections: we have, in short, to fall back on general principles of law and on practical considerations of convenience.

As far as we have gone (Lecture XVII.) in describing the general process of constituting Forest Estates, I have nearly always been able to quote a direct provision of the Act; or at

least my conclusion could be directly inferred from the specific words used by the Legislature. But when we come to consider (as at present) what is practically involved in *defining* a forest-right as the Act requires, we naturally ask, *how* is the "extent," "number," "quantity," spoken of in connection with grazing and wood rights (and others similar), to be fixed? The Act does not tell us. Or again, the Acts direct (with some variety of phrase) that if easements (of produce) are not provided for by transfer to some other convenient locality, they are to be admitted to exercise in the forest *subject to regulation;* and it is added that Rules may be made on the subject of the regulation of rights: but the mode of regulation,—what is admissible and what is not—is nowhere described: a few words only are given which furnish only a general indication of the lines on which we may proceed. Or yet again; it is laid down that if rights cannot be provided for in the forest, with proper regard for the "due maintenance" of the forest, they are to be 'commuted' or got rid of by compensation. The law is silent as to what is to be done supposing that the F. S. O. can fairly enough provide for some of the (total) rights to be allowed, but not for all. It does not suggest that he is to allow the *older* rights and disallow the *newer* ones; or that he is to reduce the whole proportionately; nor does it state any other rule. It would seem also that if the rights cannot be provided for in the forest or by transfer, they are in all such cases, to be compensated or bought out. This, if really intended (which may well be doubted), is a provision unnecessarily costly to the public treasury, and quite beyond what the French law (Code For. Act, 65) [1] or any other law in Europe (that I am aware of) requires or allows. It is only necessary further to notice that, in speaking of buying out rights by compensation, though the means are generally described as "land," "money," or "other means," and the choice is left to the F. S. O. (after hearing both sides and subject to appeal); nothing is said as to the principle on which one or other should be selected; and—what is of far greater importance—nothing is

[1] Under this article, no kind of compensation is claimable for rights which the *capability of the forests* will not enable the State to satisfy, and which are "reduced" accordingly.

said as to the manner of valuing (and capitalizing the value of) rights for the purpose of compensation.

In all these matters it is necessary to offer you some guide; and it seems that the only way of doing this, is to refer to the best authorities of countries where all questions relating to forest rights have long been carefully discussed and practically dealt with; and that, be it observed, under conditions in which the right-holders (no less than the forest-owners) are keenly alive to their interests, and are quite able and ready to stand up for themselves before the tribunals. These authorities are not adopted wholesale; they are considered with reference to the general principles of law already established, with reference to the practical conditions of Indian life and working, and with reference to equity and to local convenience.[1]

You will, I regret to be obliged to warn you, find in India, that in some cases Forest Settlements have been made, in which, owing to various causes, the rights of private persons—produce rights I mean—have not been defined or regulated even as far as the Act directly requires or allows. This in the end cannot fail to be productive of trouble. Forest Officers, as you know, are taught, throughout their course, always to have an eye to the future. Nothing is more abominable in Forestry, than the idea—"anyhow it will last my time." Forest Officers always take part (as representing the forest-owner's side) in such Settlements; and if they thoroughly understand the principles of what ought to be done, they will at any rate be in the best position to advise, and may obviate failures in Settlement work. They may not always succeed in getting everything ideally perfect, real difficulties being sometimes in the way; but the better they know what *ought* to be, the more likely they are to be in a strong position to advise and help.

These remarks will not be useless though they deal to some extent in generalities, because it is necessary to justify me in bringing before you rules of practice which are not always *in*

[1] It cannot be said that the works on forest rights and their treatment, in Germany and France, are merely professional books written by departmental theorists from their own point of view only. Dr. Danckelmann, for example, to whose valuable book I have so often referred, as one of the best modern authorities, continually shews throughout the work, the most complete sympathy with the right-holders: he again and again enforces the due observance of produce-rights, and shews their real importance in the social and agricultural economy in particular localities and in certain stages of progress: he is ever ready to object to rules which would be hard on right-holders.

the Act: I have been careful, however, never to put forward anything that is *inconsistent with* the Act nor contrary to its spirit and intention, nor anything that is likely to prove unjust or inconvenient with reference to the conditions of Indian life and of forest working.

Before proceeding to details, I would explain that Appendix A to this group of lectures, is worthy of your careful perusal: it gives (on the basis of Dr. Danckelmann's work) a brief outline of the modern German law on the subject of our present lectures: the essential points only are given, but I think nothing really important (for our purposes) has been omitted. At any rate the original is at hand to supplement, and if need be to correct, me.

I would remark that forest rights are probably not more important (in themselves) to the people in Europe than they are in India. But in Europe the conditions of life are more complex; and there is a corresponding complexity about right-settlements which there cannot be in India. But in Europe people are better able to understand legal proceedings and to appreciate the limitations imposed, and distinctions drawn, by the law, as well as the calculations of value, and the deductions made on this account or that. And the means of calculating with accuracy, the value of rights, are more complete. Elaborate tables have been framed shewing average selling prices, and many of the average quantities and qualities that come into discussion when the valuation of rights is in question. This can be realized by glancing at the forty-four figured tables which occupy the third and concluding part or volume of Dr. Danckelmann's work. All these tables prepared with reference to European trees, and the facts of German agriculture, &c., would be inapplicable, even approximately, in India.

In many forest districts in India, if we were asked to value a tree containing a given number of cubic feet of timber of a certain kind, we could only make a rough estimate of probable local value. Still more difficult is it to determine what is the grazing capacity of different kinds of forest land: *e.g.*, we could not say that in such and such classes of forest—differing as regards the soil, kind of growth, age, height, and spread of crown of the trees—that the grazing capacity *per acre* would be so much, taking one cow as a standard, and knowing that a cow requires daily (in hay or dry fodder) a quantity of nutriment which represents a certain percentage of the living weight of the cow; and that such and such an area of forest grazing

would yield an equivalent amount of nourishment. Practical information on such points can only be acquired in the long course of years, by observation and experiment.

On the other hand, in India we have a much larger discretion left to the Forest Settlement Officer; a much greater simplicity in the character of the rights, and in the nature of their title; and we have a much less frequent necessity for commuting them. And when we have to commute, a much rougher process of calculation will long continue to answer all expectations. In India, for example, no undefined right can ever come up for valuation. In Germany it can; rights are sometimes (*bestimmte*) defined in their original title, and sometimes not; the undefined rights have, no doubt, to be defined before valuation, but even then there are certain legal peculiarities which remain to distinguish one from the other (such as arise, *e.g.*, when it is a question of diminishing the number of cattle consequently on the inability of the forest to support the whole). Various questions also arise about the (*Mitnutzung*) or right of the owner to share the produce with the right-holders. Then again in valuing rights, they allow a difference in the basis of valuation, according as the demand for compensation has emanated from the easement holder or from the forest-owner: there may be *either* the value of the right to the holder, *or* the value of the benefit which will accrue to the owner by his being relieved of the burden: and there are some rather complicated considerations to be entertained, as to when one principle and when the other, is to be followed. For all these purposes, the Special Courts which determine disputed matters, have the aid of official experts and valuators.

Having thus prepared you to expect a much rougher and simpler mode of dealing with rights, especially in the matter of their valuation for the purposes of buying them out, I will commend to your reading the *Appendix* itself, pointing out that the rules about *definition and regulation* are often eminently practical, and instructive for our own purposes, especially as supplying details where our Act is silent, or where it leaves matters to *local rules*, which will necessarily be drafted with the advice of professional foresters who will welcome useful hints and suggestions.

I have now to recall your attention to Chapter II. of the Indian Forest Act (and the other two leading Acts are almost or quite identical). You will recollect that after issuing a notice of the proposed forest, and after disposal of claims to the soil itself, or to plots of land in the general area (p. 262), the F. S. O. has to deal with *easements*, one class of which represents

rights to use the estate in some way but not to take any produce, while the other (and most important) class involves the taking (in various ways) various kinds of produce of the forest or its soil. We spoke of the efforts made to *find out* all such claims to easements; and how in the end, easements not found out, are formally deemed not to exist. On receiving (or discovering) the claims, the F. S. O. is directed by the Act to proceed to make a record of the rights. This record not only gives all particulars of name, &c., of persons, and of estates to which rights may be attached, but it is further to include a *definition* of the rights, which is, in fact, a reduction of vague or general claims to specific dimensions according to their real nature, as may appear to be just and right with reference to sound principles and the circumstances of the case.

We have fully considered the basis on which these rights rest; how they came to grow up in the waste adjoining occupied or cultivated lands, and how it was necessary to acknowledge them on an equitable rather than on a strictly legal basis (Lect. XVIII., p. 281). The necessity for *definition* arises, in fact (in India), chiefly out of these antecedent conditions. Forest rights, we observed (and a brief *résumé* will be pardoned), rarely originated in anything like a formal grant, the terms of which can be referred to. Even when there are orders (somewhat analogous to a grant) passed at a former Land revenue settlement (possibly at a time when forest interests were thought of little importance), the terms will be found almost as general and indefinite as the prescriptive claims. The "jungle" being, in former times, largely in excess of the occupied land and of the wants of the population, people went into the nearest wood and took what they wanted; they drove their cattle to the most convenient place where there was grass, and also water and shade. Even where the habits of the people were pastoral, the vast tracts of forest were far in excess of the actual grazing requirements. Nobody then cared how many cattle were grazed, or how much wood was cut. The march of events, however, has put a period to this state of things. The population has increased largely; the forest has become more and more restricted; and it is now a matter of importance to know to what extent such rights have to be provided for. Following the general principles of law and

equity, the rights will, in ninety-nine cases out of a hundred, be justly decided to be rights for the actual personal and domestic wants of the right-holder, with reference to his farm and its out-buildings, or to his occupation and general circumstances. The Settlement Officer has, therefore, the duty of reducing vague and general claims to something definite and tangible, in terms of the actual need or requirement of the right-holder. Such a definition may be a work of time and require much labour; but forest management does not look merely to the present nor even to the immediate future. As years go on, the importance of having rights defined will become more and more apparent; and if deferred or slurred over, it may be found that the task which could once have been comparatively easy, will in the future, become more and more difficult. Not only so, but as the settlement of a forest estate involves in some cases paying compensation for rights, it is obvious that the right must be valued for the purpose of awarding its equivalent, and it cannot be valued unless it is made definite.

Lastly, in not a few cases, definition and the fixing of number or quantity in the case of an unlimited right, is in itself sufficient to ensure the right-holder's permanent enjoyment of it: since it allays all doubts as to whether the forest can continue to supply such a right or not.

As to rights (easements) of the class which does not involve taking any produce, it will be observed that the Act only requires (sec. 6) that the F. S. O. should record such rights. It says nothing about defining or regulating them. The sec. 11, which speaks of definition, &c., applies only to the other class: *i.e.* "rights to pasture or forest produce." Sec. 10 expressly distinguishes these from rights of way, watercourse, &c. Probably it was thought that such rights would only be claimed, or be found to exist, when really necessary; and would be, in their very nature, sufficiently definite: in any case the provisions of sec. 24 would do all that was required; so that only a record of the right, and of any consequent arrangement made under sec. 24, need be put in writing.

I may at once say that there could be no objection, legally, to adding to the record of the right of way, or of watercourse allowed, any specific details (tending to the convenience of both

sides) such as will presently be mentioned, and which will appear to be necessary.

### The Right of Way.

This right is contemplated by the Act as an *easement* belonging to an estate, a person, or even to a village or a community; the general right to use a *public* road,[1] is not a question of easement. But it is not in practice needed to distinguish the one from the other: in sec. 24 all roads—usually they are mere village tracts through the forest,—are dealt with on the same footing. It may be that there is a regular district road or even a public metalled road, through the forest; that of course is not interfered with; and if the traffic on it exposes the forest to risk from cattle-trespass or fire, it will be for the Forest Management to adopt fencing (or thorn-hedging) or a line of trench and mound (of the earth thrown up out of the trench), or to keep a cleared strip as a precaution against fire, according to circumstances.

It is necessary to record all private (or semi-public, *i.e.* village) tracks and pathways: they are only allowed when necessary. No compensation is provided: because if the road is really wanted, no compensation would be possible; if not wanted, none would be called for. Sec. 24 simply provides that if the Forest Officer finds a track or roadway to be injurious to the forest *and* that there exists another, or that *he* can *make* another "reasonably convenient," he may report to the Local Government (or to some officer specially authorized by the Local Government), who, being satisfied, can direct the closure of the old road. It would follow that if roads were closed and new ones "constructed" by the Forest Officer, the Department could be responsible to make and maintain any bridge, culvert, &c. that might be requisite. So when any fencing is required, the Department must do it; the right-holder could not be asked to bear the expense.[2]

[1] It is hardly necessary to caution the student that it is not every casual track that may happen to cross the country, that constitutes a public or a private way. And if there is a question whether a particular track is or is not a "way" by public or private *right*, the point must be settled on its merits. People are often in the habit of crossing over unfenced waste or forest, and yet they may acquire no right (per Abbot, C.J., in *Blundell* v. *Catterall* (5 B. & A. 315).

[2] It is conceivable that some special right of way might be granted on express condition of the *grantee's* keeping a fence: but that is a different matter. The

When a right of way has to be recorded specially,—whether for a private owner, or a whole village,—it may become desirable to specify whether it is a way for passage of human beings, for driving cattle, or for taking carts along: and in such a case it may be desirable to record the width of way allowed. Obviously for human passage only, a much narrower line is needed than for cattle or carts. There is nothing in the Act, that would prevent the record of a *definite width* to be allowed: or if there was any special doubt, the terms of sec. 24 would certainly allow of a restriction as to width if reported to and approved by Government; or Government could pass a general rule on the subject—as being one of the matters (sec. 75) involved in carrying out the provisions of the Act.[1]

In connection *with rights of way*, I may allude to a matter which is practically important, but technically is out of place, for it is not a question of the right of a private person over Government Forest, but a question of the right of Government as forest-owner, to a use of way over private lands; I refer to the

Hazára Forest Reg. (sec. 31) may be here compared: a penalty for cattle trespass is not exacted, if reasonable care has been taken to prevent the straying of cattle off a road traversing the forest: the owner must fence if he wishes for absolute protection.

[1] It may be interesting just to indicate some of the features of early and modern law on the subject of rights-of-way.

The Roman law (Justinian, Lib. II., Tit. iii.—this has coloured all the later laws) divided rights of way into three classes:—

(1) *Iter*, which was a simple right of passage for man on foot or on horseback.
(2) *Actus*, which was a right to drive cattle and vehicles.
(3) *Via*, the most general right, which included (1) and (2), and also (in the absence of special agreement to the contrary) the right of dragging timber, &c. over the land.

The extreme width of land that could be occupied by the complete right of way, in the absence of special terms of grant, &c., was eight feet in direct line, and sixteen feet where it turned to change its direction.

The Bavarian *Landrecht* (Theil II., Kap. VIII. sec. 11), allows (in the absence of special terms) three feet for a simple right of passage and eight feet (sixteen at turnings) for the right-of-way for cattle or carts. The Prussian *Landrecht* (Theil I., Tit. 22, sec. 79, as quoted by Roth, secs. 263—265, and Eding, p. 99) allows three feet for simple passage; four feet if the way is to be ridden over; eight feet (twelve at turnings) for a cart-way; and sixteen feet (twenty-four at turnings) for cattle driving.

The Saxon law gives three feet and eight feet, like the Bavarian; but allows circumstances to be considered in fixing a proper way for cattle driving (Qvenzel, p. 193).

The Italian, French and Austrian laws do not prescribe any fixed breadth, but leave the right to be determined (in the absence of special evidence) according to the circumstances and the nature of the locality.

The English law contains no special provisions on the subject, as far as I have been able to ascertain. I presume that the general circumstances would be taken into consideration.

case where timber has to be dragged across private land. In Europe some of the laws expressly provide for this. It is not mentioned in the Indian Act, but might perhaps[1] be provided for by Rules (sec. 75). In the Burma Act, it has been mentioned as a subject for a *rule* under the head of Control of Timber in transit (sec. 43, *i.*). In the Madras Act, sec. 35 conveniently provides that Government has a right to extract its timber, but on paying full compensation for any damage to the land or crops, &c. caused in the process.

### *Rights to Watercourse or Drainage.*

In some cases of forest plantation, or in the cultivated districts, it is possible that the forest may be traversed by some *canal cuts*, and it may be needed to refer to the district Canal Officer; and the *Canal Act* of the province may contain rules which have reference to it; or there may be a private irrigation channel. So too, some question of the course of a private drainage-ditch or the flow of drainage water, may require to be settled and defined. It will be easy to record any such right, specifying any particulars (in case of a canal or ditch), such as regard access for purpose of clearing, or deposit of the silt cleared out, or the like, as well as the width of the channel and its necessary margin or bank-space.

### *Use of Water.*

A very common right which is in practice dealt with under this head, is not specifically mentioned in the Act. I refer to the *use of water*, where a spring or pool in the forest is the only place which the neighbouring cattle can get water at, or at which household water can be obtained. This may be a "right of necessity" and should certainly be recorded; it will often

[1] It is obvious that there are cases where without a power to drag timber or other material out of a forest across private land, the forest might be unworkable. If a constant passage of timber was contemplated, a strip of land for a timber road could, however, be expropriated. The only European law in which I have seen this right expressly asserted is in the Austrian Gesetz of December, 1852, sect. 24. In France and Italy, the matter would probably be covered by the general provisions of the Civil Code, which require access to be allowed to "enclaves," *i.e.* property surrounded by other estates, so that it cannot be got at without crossing one or more of them.

involve a question of a road—or path—to the water source.[1] A similar question might arise about the use of water in a stream passing through the forest. This would not however have anything to do with the question of *fishing*, nor with the matter of the control of the water of a river used for timber floating, which come under different heads.

## The Definition of Rights to Forest-produce and Pasture, etc. in general.

This is by far the largest class to be dealt with; and I may remind you, that it does not follow that every *claim* will be admitted: the Act therefore requires a distinct decision of the F. S. O. whether any *rights* can be recognized, *i.e.* whether on the statement of claim being reduced to writing (sec. 6), the F. S. O. will not pass an order rejecting it as a claim of right (even if he proposes some kind of "concession" or "license").

But supposing a right ought to be admitted, the difficulty is to say how far and to what extent. To indicate the principles on which this difficulty is to be solved, and how a record of the particulars required by the Acts (sec. 18) is to be made, is the object of the present lecture. I must specify *seriatim*, what can be done in the case of each kind of right; the Act indicates them only *en masse*, as "rights to pasture or to forest produce."[2]

[1] Such a right is an easement in English law, see Williams, p. 18.

[2] The Forest Acts do not use the term "Easements;"—not merely because the Easements Act of 1882 was not then in existence; for a similar definition is contained in Act XV. of 1877, which was (and still is) in force all over India. I do not recollect that the subject was discussed when the Act was being drafted; but I cannot help thinking that the term was avoided, lest it should be supposed that the F. S. O. was not to recognize any "right" unless it exactly complied with the terms of sec. 26 Act XV. of 1877; and it was intended that a more equitable view of the grounds of recognition should be taken, as I have explained at p. 281. Nevertheless, when rights have been admitted as such by the F. S. O. (and not mere licences given), the rights so admitted, recorded, and defined, *become* strictly easements, for all legal and practical purposes.

I have therefore adopted the following list :—

- A. Rights to wood.
  - 1. For building.
  - 2. For industry and agricultural implements.
  - 3. For fuel.
    - Brushwood.
    - Billet-wood.
    - Dead-wood.
    - Torches.
  - 4. For conversion, or production of some substance.
    - *Cutch*-boiling.
    - Tar making (and wood oil).
    - Charcoal.
    - Lime-kilns.
- B. Rights of pasture or grazing.
- C. Rights of grass cutting (including all herbage, but not branches of trees.)
- D. Rights of litter (dead leaves and twigs, moss, etc.; scraping up the *humus*).
- E. Rights of lopping trees (whether for fodder or litter).
- F. Rights to collect minor produce.
  - Resin, natural varnish, wood-oil, rubber, etc.
  - Roots.
  - Drugs, plants, flowers and leaves.
  - Fruits and seeds.
  - Bark and fibres.
  - Clay, sand, gravel, limestone, pebbles, or concrete, etc.
- G. Hunting and fishing.
- H. Practice (not properly a right) of shifting cultivation.

I will just notice that in the German law, definition of rights (see Appendix A) is regarded as one of the processes which can

be adopted under the head of regulation.[1] In India, owing to the different origin and practical condition of forest rights, *definition* has been made by law, *the initial process, necessary in every case, before the right obtains any provision for its satisfaction or for its exercise, either in the forest or outside it.*

In the case of *each kind of right* I have therefore to consider separately :—

(*a*) The measures properly belonging to definition, *i.e.*, to making clear the nature and extent and limits of the right as judicially acknowledged, and

(*b*) those belonging to regulation, *i.e.*, any further conditions and directions as to mode of exercise necessary for the safety of the forest (and really tending to the permanence and enjoyment of the right also).

*Definition* concerns the right as it ought to be, in itself, and without reference to the question whether the forest can bear it or not, or whether it is to be exercised in this particular way or that. *Regulation* goes further and directs how, when, and where,

[1] Definition in itself (under whatever head) is always recognized as essential by all the continental laws : the following is a brief notice of the most useful provisions on the subject :—

In BAVARIA (Law of 1852, sec. 27), the owner or right-holder can either of them claim to have an undefined right made definite. Each party bear half the costs of the proceedings if they have to go to a law court, because they are not agreed.

In PRUSSIA the rule is similar (*All. Landrecht* I., Theil, 22, sec. 235). The subsequent dealings with rights,—their commutation (*Ablösung*) and regulation when required in a forest, are matters of the Forest law, or of special laws for the extinction of rights.

In ITALY (Law of 1877, Art. 30), right-holders were allowed two years from the date of the promulgation of the law, within which to claim their rights and get them recorded. A further period of six months' grace was allowed, during which rights could still be claimed, but subject to a fine or penalty. After that, all rights were extinguished (*gli altri s'intenderanno decaduti de qualsiasi diritto*).

The FRENCH law (Code For., Art. 61) declares that no right can be recognized which is not already established by an Act of Government, or a judgment, or which was not claimed and recorded before the proper tribunals within two years of the passing of the Code. The Forest Code itself provides in other sections, for buying out rights and for regulating them.

The AUSTRIAN law (Art. 9, quoted by Grabner) provides that either the owner, or the right-holder, may claim to have a scheme recorded which sets forth the true extent of the right, how it is to be exercised, and within what limits. As the basis of this scheme, a proposal (*Entwurf*) is prepared by skilled persons ; the objections of either side to this are heard and adjudicated, and the *scheme* for the exercise of the right, as finally adjusted, is authoritatively recorded.

Further, the "Imperial Patent" of 1853 declares (Art. 4) that all rights which are so necessary (or otherwise) that they cannot be got rid of by compensation, must be settled as regards their details, and the place, time and manner of exercise, *so as to make the rights as little burdensome as possible to the forest, consistently with their fair and reasonable enjoyment.*

the right as defined[1] is to be exercised or enjoyed. But in principle this regulation *must conform to general legal requirements* as well as to any specific provisions; it must (*e.g.*) not amount to a virtual extinction of the right; it must be confined to the specific object of guarding against deterioration in the estate, with reference to the general principles already considered, regarding the relative rights and duties both of the forest-owner and the right-holder.

This distinction will be clearer from an example: *Definition* says *e.g.* "such and such a person has a right to take litter or *humus* off the soil of Forest *A*, sufficient for stabling of 10 cows or oxen, or for manure for 12 acres of rice-field." *Regulation* says further, "the right is to be exercised during daylight (say) on Wednesdays and Fridays in each week (when a guard will be present) and during the months (named) when the leaf-fall on the ground is greatest: the right-holder must show his right-ticket when called on. He must use a blunt wooden rake, not one with sharp iron teeth; he must take litter from Forest-compartments of the numbers (of which he will be duly informed) annually open for the purpose according to the sanctioned working-plan." Regulation may thus render the exercise of the right somewhat more troublesome or care-demanding, but never actually curtails it. If curtailment is inevitable owing to the inability of the forest, then this is a specific matter with which I shall deal hereafter.

The Act itself contemplates the following general elements of definition:—

**(1) There is to be a *record*, *i.e.*, a written order admitting (if it does not reject) a claim to a certain right; so that hereafter all rights existing in any (permanently constituted) State Forest will be found on a register, which is in fact the record of an authoritative judicial decision (as confirmed or modified on appeal).**

**(2) The record is to contain full particulars of name and occupation[2] in the case of a *personal* R. H.,[3] and the**

[1] Sometimes the nature of the right itself (if defined) involves a certain limit as to place and as to season of exercise.

[2] "Occupation" is noted, partly because it further identifies the person intended, but also because it indicates the usual or normal means of living, and the *status*, of the R. H., which become important, when (as we shall see) it comes to defining the right according to the *needs* of a person of a certain class and having a certain business or occupation.

[3] It will be remembered that I use "R. H." as a convenient abbreviation for "right- (easement) holder."

**name and particulars of the (dominant) estate, group of lands, farm, monastery, &c. (where there is one) to which the easement is appendant [1] (sec. 12 b).**

Under this (2) head it is necessary to be on guard against laxity, in case rights are numerous, or where the right (as is so often the case) is claimed by *a whole village.* It may possibly be a sufficient compliance, at any rate with the spirit of the section, to name the village and give the number of households, or of separate land-holders who have farms, houses and cattle, and the number of labourers, artizans, menials, &c., attached to the village (if these enjoy the right also); but that is a *minimum:* it is neither legal nor practically sufficient, merely to record a right in favour of "the inhabitants of village X." Failure in this respect would probably lead to the growth of complications, if not of new rights, which is prohibited.[2]

**(3) *For a grazing right,* the Act requires a record—**

**(a) Of the *number* and *description* of cattle (which may vary "from time to time").**

**(b) The season of pasturage.**

***For wood-rights—***

**The quantity of "timber" (wood or trees of any kind, including bamboos, by the definition clause) and "other particulars that the case may require," *i.e.*, which will make the right definite as to quantity, kind, or class of materials, under the varying forms of wood-rights (as indicated in the list at p. 319).**

***For all other rights—***

**The quantity and "such other particulars as the case may require."**

**(4) The record must state whether it is a feature of the right, that the produce may be bartered or sold:—**

*Ad* (4) It may be a feature of the right itself (although this is again disallowed by the French and Italian laws[3]) that the pro-

[1] I have before observed, and may here bring the matter to recollection, that, however the European text-books lay down that Forest rights are "real" servitudes, *i.e.* always appendant to (or enjoyed in virtue of the possession of) some specific land or house, &c. (which is called the *dominant estate*) the same assertion cannot be, at any rate, universally made in India. Facts can be the only guide. Some rights may be in their nature appendant; *e.g.* a right of way or water-course; for it is hardly possible that A. can have a "way" across B.'s land unless he has some land or house to get to or from.

[2] See on this subject at p. 271.

[3] See, for example, Art. 83, Cod. For. But *Meaume* says that it is to be

duce of the right may be sold. In some parts there are jungle tribes, who make at least a part of their living by cutting bamboos, loads of grass and firewood, and carrying them for sale to the villages and towns at the foot of the hills. This fact is then one of the features of the right which it is requisite for the Forest Settlement Officer to ascertain and record. Otherwise, it is a general principle, which we have already noticed (p. 291), that the right is for the R. H.'s own use and convenience, and to be measured by his actual personal, business, or domestic, wants. In other words, he may have what he wants for his own use, but may not sell or barter the produce obtained.

This principle is founded on the natural equity of the case. As a Forest right exists for the benefit of one person to the diminution of the enjoyment of his property by another (the forest-owner), it is plain that the right ought not to be made more burdensome to the Forest Estate than is necessary to secure a fair and sufficient exercise of it[1] see (p. 291).

If a man might get wood not only for his own household but also to supply the market, he might gradually enlarge his sales to such an extent as to ruin the forest, and swallow up its whole produce.

Where, therefore, it is in the nature of the right itself that the produce is for sale, the Forest Settlement Officer must consider the quantity of produce which the right-holder has a right to. Probably he will take an average based on what the quantity taken by the right-holder, in a series of former years (as far as

understood that if the forest-owner does not object, there is no reason why the produce should not be sold in some cases (*Meaume*, Vol. I., p. 466, sec. 407). Danckelmann (Vol. II., p. 39) and Eding, p. 111 (and so Roth, sec. 306), allows of the sale of produce only if the right is to a fixed quantity (because the forest has to supply *that*, and it cannot matter what is done with it), but not so, of course, where the right is only for the right-holder's own wants. Otherwise, there would be a fraud on the forest-owner. In English law the rules (which depend on the right being of one kind or another) are not very clear. It would seem generally, that the produce of a right "in gross" (personal right) to a fixed quantity of material may be sold (*Cooke*, pp. 39-40). On the whole, the law in the India and British Burma Acts is the most reasonable and best suited to the circumstances of the country. The produce is ordinarily for the owner's own wants, and is not saleable, unless it is an express feature in the right that the produce is taken for sale.

[1] This principle is recognized by all the European laws, as well as by the old Roman Law—Justinian, Lib. II., Tit. V., I. * * "ad usum quotidianum utatur * * * ut neque domino fundi molestus sit, neque iis per quos opera rustica fiunt impedimento: nec ulli alii jus quodlibet, aut locare aut vendere aut gratis concedere potest." See *Meaume*, Vol. I., p. 13, sec. 3, and p. 465, sec. 407. So the French Civil Code (Art. 630): "*Celui qui a l'usage des fruits d'un fonds, ne peut en exiger qu'autant qu'il lui en faut pour ses besoins et ceux de sa famille.*" So Eding (p. 77) Saxon Mandat of 1813, sec. 5 (Qvenzel, p. 202).

this is ascertainable), has actually been. Thus the right will be definite, and will not be able to be extended year after year.

Nor can the right itself be sold or mortgaged, or otherwise alienated. If the person entitled to take for his own use, say, ten trees of a certain growth every year, does not want the trees, he must leave them growing; he could not lease or sell his right to take these trees, to another person. The exception to this is, that if the right is appendant, then (of course) it may pass along with the property to which it is appendant when that property is transferred. So also on the decease of the right-holder, the right passes on by succession to his heirs (sec. 23).

Before proceeding to the detail of each right, according to its kind, there are some general points connected with definition to be considered.

*Certain Preliminary Matters connected with Definition.*

In some cases it may be that the general features of the right are defined aalredy, by a written order or grant; and then it will be understood that the grant or order itself is the very best evidence of the nature, extent, and incidents of the right. And it, no doubt, occasionally happens that individuals of villages hold "sanads" or "parwánas" or other documents, issued by the Government or some competent authority at the time, distinctly recognizing certain practices or enjoyments of Forest produce which, if the grant does not clearly contain words limiting the duration or reserving the power to recall the permission, are practically *easements*. I have already alluded to orders passed at the time of the Land Revenue settlement, which, in effect, amount to *grants* of Forest rights. Such orders, as I have remarked (p. 313), are often in very general terms, and will need therefore to be reduced to a definition according to intention of the grant and the requirements of the case.

In India there are no technical rules about such "sanads" and orders: they must be fairly and reasonably interpreted. In a case in the Bombay High-Court, known as the Pigondé case (Conservator of Forests *v.* Saubhágyadás), the Judges quoted as authoritative, the ruling of the Privy Council as follows: -"Upon a question of the meaning of words, the same rules of common sense and justice must apply, whether the subject-matter of construction be a grant from the Crown or from a subject.". . . . "It is always a question of intention to be collected from the language used with reference to the surrounding circumstances. *If those*

*guides fail, but not otherwise*, the ancient rule that 'if the King's grant can enure to two intents, it shall be taken to the intent that makes most for the King's benefit' may be followed."

In the case of a forest, I submit this rule is more than usually reasonable; for the forest exists for the public benefit, and if there is uncertainty about the grant, the grant ought not, on general principles, to be held to burden the property more than is necessary. Where the grant can, however, be interpreted by its express terms and by the circumstances, there the true intent must be allowed.

Here I may take occasion to mention another feature which may be found to attach to certain Forest rights. A right need not be absolutely gratuitous; it may be properly called a *right*, and yet the right-holder may have to render some service or make some payment for it.[1] And this may possibly be the case with rights which were distinctly *granted* by some "*parwána*," order, or "*sanad*," &c., in which the right is conceded as such on certain conditions. Ordinarily speaking, a right which has merely *grown up by prescriptive* exercise, would not have a condition attached to it, because then its origin would be traceable to some person who gave the right and annexed the condition. Moreover, when a payment is made for the use of Forest produce it might indicate that there was no *right*, but that the produce was originally leased or sold for the money that was paid, and thus was not enjoyed *adversely*, but on a long-standing contract or permission. Still a payment might have become customary, and be as ancient as the right itself, and both together might be admitted as practically established by prescription; everything would depend on the circumstances of the particular case.

A forest-right may also be, by its origin, permanent, or it may

[1] See *Roth*, § 293; *Meaume*, Vol. I., p. 30. Students from Nancy who have read the *procès verbal* of the working scheme of the forest called La Grande Haye, will remember how a certain *commune* was there entitled (by grant of one of the Dukes of Lorraine) to certain wood-rights in consideration of a "*rédevance*" of two "*quarterons*" of good oats and a fowl from each household. Here the area over which the right extended was fixed, while the number of households might increase. This led, in the course of time, to the value of the payments exceeding the value of the right. Consequently, the people refused to take the wood, and the right was ultimately adjusted by compensation and got rid of.

This is quite different from the case where grazing in a forest is sold annually, or for a term of years, and a contractor buys it. The same person might go on buying year after year, but he would acquire no servitude or legal right; his title would be simply *by his contract*, to have his profits, or the wood, or the grass, or whatever he bought.

be for the life only of a certain person, or for several lives. This would be, of course, in cases where the right had been specially granted or allowed, in set terms.

As the growth of new rights is not allowed by the Act (sec. 22), it is obvious that such growth ought not to be indirectly encouraged by entries in the record at the Forest-settlement (*cfr.* p. 271). It may possibly be the case that there was an express grant "to all the inhabitants of X for the time being"; but otherwise the rights are taken *as they are at the time of settlement.* Existing householders and persons are provided for: and as to the *extent* of right, the 'actual need' (pp. 291, 323) will be either ascertained, or checked, with reference to the *average* past exercise; for it is obvious that a farm will keep such number of cattle as it really wants for its usual working; and the average number it actually has kept for a series of past years is a good test.

New settlers in a village cannot have anything that can equitably be called a prescriptive right. It is necessary to add, however, that it is right to calculate number (or quantity, as the case may be) so liberally, as *to allow for the full development* of the existing farm, or business, *i.e.* to provide for it as it should be, in a fairly prosperous condition. In no case does this include provision for cattle kept (or material used) for some purpose not connected with the natural or normal working of the farm, or the business of the person, but which the farm or person may undertake for extra profit (p. 291). The prospective increase which may be justly allowed for, is either—

(*a*) Natural development such as is due to peace, security, and general prosperity;

(*b*) Where the village, and consequently its farms and inhabitants generally, have hitherto been (from any cause) in a reduced condition and is gradually recovering. "Similarly," observes Col. Bailey, "a village may, owing to dacoities (or other calamity) have been reduced by emigration of some of its inhabitants, who in more settled times may be expected to return."

# LECTURE XX.

## THE DEFINITION, REGULATION, AND BUYING OUT OF FOREST EASEMENTS.—(*Continued*).

### *Details of Definition* (*see list, p.* 319).

### (A) Of Wood-rights.—(1) *For Building.*

THE right to wood for building, which, especially in hill districts, may require timber of large size, and therefore of greater value, is a right which may be burdensome to the forest but is often indispensable to the right-holder. The "actual need" in this case, is with reference to the house or cottage, and the sheds, barns, and dependent buildings, which represent the equipment of the agricultural holding or other dominant estate, or the house and accessory buildings[1] proper to a person of the class to which the R. H. belongs.

The wood is wanted periodically for entirely rebuilding, and at other times for keeping in repair, the premises mentioned.

Reference has always to be made to the usual style of building in the locality. In the plains (*e.g.*) roof poles are mostly wanted: in some countries the house is raised some way above the ground, being supported on stout poles. In the hills, log-huts and timber houses, with slab or shingle roofs very similar to the Swiss "chalet," are found; and sometimes slates or slabs of fissile stone are in use instead of wooden slabs. Houses in the Basáhir Forest district (Sutlej Valley) are usually built with a framework of timber filled in with stones. According to the sort of building, the *kind* of wood can be prescribed; and there is never any need to allow the best or more costly woods for indoor or other work where an inferior timber will do as well.

The *quantity* cannot always be prescribed; but sometimes a periodical cutting of so many stems (of a certain size) can be defined. More usually, the R. H. is required to make a special

[1] It is convenient to refer to the dwelling-house—or other chief premises—as the "principal building," and the sheds, outhouses, &c., as the "accessory" buildings.

application for what he wants, specifying what the work is, whether for general repairs, for re-roofing, for a door, &c.: this application should be checked by some local authority prescribed in the record. If the intervals at which wood can be demanded are to be fixed, it will be with reference to the number of years each kind of building will ordinarily last. The larger or better class of village house cannot need rebuilding frequently, but there may be repairs which need wood annually.

What has been said about the right being for the *existing* farm or estate to be provided for (p. 326) is here also applicable. The definition should, however, allow for such reasonable improvement of the holding and its buildings as does not amount to a formidable growth in the total demand, or a complete change of form. It could not be allowed (*e.g.*) that a right to wood originally required for a cottage and a barn or two, should in time grow into one for a large timber *chalet* or for a whole series of outhouses.[1]

### (2) *For Industry and Agricultural Implements.*

In the case of wood required for industries or agricultural implements, the *purpose* can always be defined; and in all cases it will be found that there are customary kinds (and sizes) of wood used for the particular purpose; or such can easily be prescribed to the satisfaction of all parties. It rarely happens that the right to wood for plough pieces, harrows, &c., is burdensome, or any serious tax, on either the Forest growth or its money-revenue. But under this head will come local cases of demand for large and perhaps valuable trees—*e.g.*, *Hopea* and "Sál" (*Shorea robusta*), for hollowing out canoes or boats. In all such cases the exact kind and size of tree can be specified; and the taking out a special pass or permit for the cutting should be insisted on. And it can be conditioned to certain periods ascertainable by enquiry: canoes and boats of this kind must last for several years. A right to wood for large pestles and mortars used as oil mills, will be dealt with in the same way.[2]

[1] There are some good remarks on the subject in Danckelmann, Vol. II., p. 68.

[2] It would hardly be necessary to recognize at all, purely wasteful and un-

### (3) *For Fuel.*

The demand for wood fuel may take various shapes, but in India these rights rarely reach the dimensions or the importance they do in Europe. In the hills, where there is a severe winter, solid billet wood may be (for some months in the year) a necessity; but in the large majority of cases, small wood, and even brushwood in bundles, is all that is even asked for, for domestic hearths and ovens.[1]

Wherever there is an ample supply of dead wood (not meaning dead timber-stems, unless they are old, long fallen, stems (*Urholz*) of no other value), it is always permissible to require its use before living wood is cut. And in forests which are being regularly worked, it is often possible to require branches and crown-wood (which in India is rarely utilizable), to be taken when available, in lieu of other kinds. In no case can mature *timber* of any "royal," "reserved," or other valuable tree, be claimable for fuel rights—*i.e.*, to cut up into billets. Thinnings (not otherwise utilized) and the wastage of fellings, &c., are of course available, however good the kind of tree.

The right to fuel is spoken of in the English law as "Firebote" or "Common of Estovers" (*Affouage* of French law). In Europe, where all material in a forest, as a rule, has value, a distinction is drawn between faggot-wood (of twigs and branches), firewood from stems of a size that only require to be once split, wood split into four;[2] and again the right to *dead* firewood is variously classified.[3]

reasonable claims. Twenty years ago I saw in Burma, fine large trees of "padouk" (*Pterocarpus dalbergioides*) cut, and just the largest circular cross-sections taken out for solid cart-wheels: the rest was thrown away.

[1] It will almost invariably be found in India, if the former and usual practice of a fuel-right be inquired into, that the R. H. has always gone to the nearest jungle, with or without some bullock, pony, or beast of burden, and cut and carried away whatever he could collect with the least trouble. Small trees of valuable kinds, are always, by custom, left untouched.

[2] Whence the familiar French terms, "*bois de cordes*" (that tied together in faggots), *bois de rondin* (burnt in round billets), *bois de fente*, *bois de quartier* (that has to be split into two or four).

[3] In the German books, for instance, they distinguish *Lese-* or *Raff-holz*, which indicates broken branches, &c. (*a*) fallen by age or decay, (*b*) left behind in felling, thinning, &c., as of no value. *Lagerholz* refers to trees blown down by storm, fallen by snow-weight, or whole trees fallen by age (*Urholz*). *Lagerholz* ought not to exist in a well-managed forest except as the result of some calamity. *Bruchholz* is like "*Leseholz*," only that the wood is not dead or rotten but broken by storm, &c. *Ast-holz* means boughs that are dead and can be snapped off with

Definition (beyond general instructions as to kind) is not easy; but it may be possible sometimes to specify a number of bundles, head-loads, bullock-loads, &c., to be taken *per mensem;* or to prescribe a certain area to be cleared of brushwood, leaving some village officer to divide the produce; if solid billet-wood has to be given, it ought to be possible to specify the size and the number of stacks of certain dimensions.[1]

In all cases, however, it would be possible to ascertain some limit, because the right is for the firing of a certain number of hearths, ovens, and cooking-places, belonging to the houses to be supplied. And a consideration of this would obviate an excessive allowance. As however the stuff cannot be sold, and the R. H. rarely cares to take more trouble than he need, he is not likely to cut and carry more than he really wants of the dead wood and small stuff which is his habitual consumption.

In the rare case (I do not know of an actual instance) of a right to cut firewood for sale, it would be necessary to fix a limit as to the number of bundles to be taken (of a certain dimension) and of the (general) kind or description of wood or brushwood.

As we have mentioned dead wood (bits and branches lying) or that can be broken (not cut) off by hand, or that comes from old fallen trees (long lying and decayed), it is well to speak at once of dead stems, *i.e.*, those *standing* dead (killed by fire, disease, insects, or by lightning), or *recently fallen* by effect of storm, avalanche, &c. No "dead wood" right extends to trees recently killed by some calamity on a large scale, and rarely to single trees standing dead or thrown down by storms.[2]

the hand without use of cutting tools, or branch wood left behind after a felling, &c. *Trockene Stämme* include all *standing* dead poles or trees. There may also be rights to stumps and rootstocks, *i.e*, both above and below the surface.

[1] Charcoal, fuel-billets, &c. should *always* be dealt with by loads, or some measure of *bulk* or *dimension*—never by *weight*. The latter is still often spoken of, and *used* to be so always; the consequence being, endless disputes owing to the difference caused by drying or by insects (if the wood is long stacked), and sometimes fraud: *e.g.* charcoal dealers poured water on the mass to increase the weight. This, of course, becomes useless when the delivery is by so many sacks of a certain size, or baskets, or cubic feet, &c.

[2] I once met with a case in the Panjab hills, where the manager of a temple—located, as is so often the case, in a *deodar* grove—had a right to trees blown down, &c. in the adjoining forest, for repairs. I believe the fall of the trees was occasionally aided if not artificially caused. In fact, in all cases of right to *dead standing* trees, if any such are obliged to be admitted, it is necessary to provide precautions against people *killing* trees on purpose to get them.

In hill forests, rights will sometimes be claimed to split resinous pieces off pine stumps or deformed trees, to be used as torches. In the old days, it was usual (to save trouble) to fell *deodar* trees seven or eight feet above the ground. The stumps were afterwards used by the villagers to cut torchwood from.[1] Such rights would always be defined to be for *deodar* or other resinous pines, and only from stumps, or from deformed and ill-grown trees.

(4) *For Conversion, or Production of some Substance.*

The practice of burning lime and making charcoal, commonly allowed in some classes of forest, is not often, as far as I am aware, claimed as a *right*. Such cases are rarely troublesome to deal with. In some forests, limestone pebbles are found in the torrent or stream beds that pass through them, and are dry for many months in the year; in others some form of lime-concrete is found in the soil (*kankar*, &c.); or some other material of the same class is calcined for use in mixing mortar. This material is collected, and then to calcine it, a further supply of light brushwood is required.

"Cutch-boiling" (extract of catechu from the wood of *Acacia catechu*) is almost confined to Burma. Here the trees (of a certain size) have to be cut, and the fuel for the boiling is obtained from the *debris* of felling, and from the dry chips that remain after the extraction of the catechu.

If in any case *rights* of this kind are found, it is more in the way of *regulation* that they require, to prevent risk of fire to the forest. They will be easily *defined*, as to general size of kilns or stacks, and the number of them that may be prepared in each season; the kind of material used is easy to ascertain and record.

In the case of rights to preparation (by distilling, &c.), wood-oil, tar, natural varnish, &c., the definition and regulation can hardly be separated; the kind of tree, and the *minimum* size for tapping, must be defined. In the case of distilling tar and pine-wood oil from *deodar* and pines, either the chips from fellings are thus utilized, or stumps or trees worthless for timber.

[1] *Kien-holz* in German.

In no case can such rights extend to felling useful timber trees (see also under head "*Resin*"). Only refuse or worthless brushwood is required for heating purposes.

### (B) Of Pasture Rights.

The general remarks made in Lecture XVIII. (p. 291) will already have suggested the rule for defining the *number* of cattle. It is to consider what number of each kind is proper for (or actually needed in) the ordinary, normal, and prosperous working of a farm or holding such as the R. H. has, or for his sustenance and for maintaining his livelihood (in the case of a purely personal right). This number is very much what the older writers called the number of cattle "levant and couchant" on the farm. The old standard, of the number which the farm (or person) could keep in stall during winter (or when there was no common of grazing in exercise[1]) is now everywhere disused. The actual number is judged of (*a*) by taking the average number kept during a convenient number of past years; (*b*) by comparison with the number, on similar farms or holdings in the neighbourhood, which is known to be reasonable and proper.

Allowance is made for a fair expansion (see p. 326), which does not amount to a wholesale creation of new rights. A man, for example, has a given number of acres and his family dwelling: he requires a certain number of plough cattle—oxen or buffaloes; he will also want cows for milk and perhaps a few goats. If he lives by selling milk, then cows only (or cows and goats) will probably be his stock. Allowance should be made for a full and prosperous condition of *such* a farm or business.

It is usual to allow sucking animals with their dams, as not in excess of the number reckoned: the privilege extends to the first year of age only.[2]

Observe that the number is always *for* the kind of farm (dominant estate), or for a person of the class and occupation to which the R. H. belongs: *e.g.*, suppose a prosperous farmer was to take advantage of a neighbouring "jungle" to maintain an extra herd of buffaloes, to make a profit (beyond his ordinary farm

[1] Known also in Germany by the term *Durchwintrung*.

[2] In France this is objected to, because it facilitates miscounting or fraud (see *Meaume*, Vol. I., p. 420, sec. 350).

work) from the "ghí" or clarified butter so largely used in India; this grazing would be no part of his *need as an agricultural holder*, in which character or capacity his right is admitted. In all these cases, if any extra number of cattle appears (and the same principle applies in all rights), the question of fact for equitable decision is, Does this form part of the necessary work of the farm, according to its normal, or usual, working?

The requirement of the Act, that the *number* should be fixed, is a very practical one; for suppose a small village should exist, the (liberally calculated) average total of its grazing requirements may be no serious or insuperable obstacle to proper Forest working; but if the number were not fixed, it might happen that, owing to the desirable situation of the village, or the abundance of culturable waste, the place might, in the course of years, grow to double or treble the present size (apart from those considerations of growth in prosperity of the *existing* population or the restoration from calamity spoken of) (p. 326). If all these new accessions of number could swell the grazing total, the burden might become serious: it is the express object of sec. 22 to prevent this. This is no kind of hardship; new settlers must take thought of the existing conditions: they cannot expect to be in a better position than they would be if there was no forest in the vicinity at all.[1]

In some parts of India we have to take account of (what I may call) a double claim to grazing: there may be local requirements of the adjoining villages or local right-holders, and also those of migratory herds. In the N.W. Himálaya, such herds and flocks graze at different altitudes during different seasons of the year. In full summer, they go to the "Alpine" pastures, beyond the forests; later, they pass through (and make a shorter or longer stay in) the forest region. During the winter, the herds live in the lower hills. In the Kangra district, for example, such herds have for generations past, regularly grazed over certain areas of forest known by custom; and it is held that these cattle-owners have now a prescriptive right to this annual grazing for the winter season. Here it would perhaps be difficult to introduce any

[1] Obviously, if the forest was so large that there was room for more grazing, additional cattle might be admitted without risk; but not as a right, but by a "concession" or on payment.

rule about *numbers*. The same herds, when moving up to the higher grazing grounds, sometimes stay for a time in the forests of middle elevation, where the *deodar* and mixed forests are, and often do great mischief. This, however, is not always the case; the herds often merely pass through the forest and do not remain and graze.

Whether any such herds have a *right* of grazing in any particular locality must depend on the facts; but the subject is one requiring clear settlement, because it presents an instance of a double claim on the forest. Not only have the rights of the villagers on the spot to be met, which is what we usually expect in Indian forests, but a separate and numerous body of claims is introduced, the admission of which would overtax the resources of the forest, and at the same time unduly restrict the local villagers in an enjoyment of the grazing, to which they would seem to have a much more proximate claim than the others.[1]

I do not think that it could be made out that many of these migratory herds have established even such an equitable claim as should be treated as a right; and it will be necessary in settling hill forests, to examine this matter thoroughly. I believe, as I said before, that the graziers in Kangra are held to have a right, but then it is their practice to stay for some months, and they have established a customary distribution of the Forest area among the different herd-owners, and they regularly return to the same beats year after year.[2] It is more than doubtful whether any right of this kind can be made out of the case of herds traversing the forests of middle elevation (where the grazing does most harm).

As to *kind*—In India we are chiefly concerned with grazing of bulls, oxen, and cows, buffaloes, goats and sheep. Grazing of mules, horses and donkeys is rare, and presents no difficulty. The kind must always be specified. There is no direct legal prohibition about goats; and what has to be said on the subject

[1] In the Chambá State this practice is very noticeable; but there the forest is leased to Government, and therefore the matter is settled by the rules annexed to the lease. The lease does not acknowledge any rights but such as belong to local villages and resident right-holders. In the Kulu Forest (Panjáb Himálaya) attempts have been made of late years to bring in herds of buffaloes to graze. This has been very properly resisted. The forests are, by effect of former settlement orders, burdened with many *local* rights, but are in no way bound to allow outsiders.

[2] In some cases the sheep are folded at night on particular lands which get the benefit of the manure dropped. In one case, I believe, a suit was brought to compel a shepherd to continue so to fold his sheep. Those curious on the subject will compare the old English custom of *frank-foldage* (Williams, p. 275).

will better come under the head of "Regulation." Every effort should, however, be made to reduce, or to get rid of, these animals; they are always destructive to forests, and are absolutely inadmissible in a forest under restoration, a plantation or a *reboisement* work. Swine feeding (as far as I am aware) in the forest is unknown.[1]

The specification of *season* of grazing will never give trouble: custom will have determined that it is during the rainy season only, or at other seasons for some local reason. Sometimes grazing is excluded, as a matter of local custom, from the forest, for the months during which bamboo shoots are growing up, or the like. If any question arises, it will easily be settled on the merits, with reference to what is really needed.

### (C) Rights of Grass Cutting.

As an originally existing right, the practice of cutting grass is not common; but it is often recognised (as *e.g.* in Ájmer) as a kind of compromise or substitute for a right of pasture. It is possible to define it by fixing the number of bundles, or head (or other) loads of grass and similar herbaceous vegetation, growing on the surface, to be taken during a defined season (or daily, weekly or *per mensem*); some other matters coming under the head of "Regulation" may be recorded.[2]

In case this right is not for personal or for farm use but for sale, the number of bundles should be more carefully fixed. This right does not include cutting twigs or gathering leaves or boughs or brushwood.

### (D) and (E) Rights of Litter and of Lopping.

It is well to treat these heads together.

The German books have a number of subdivisions of the head

[1] At any rate, anything like the "pannage" or feeding on acorns and beech-mast of Europe. In Europe, swine feeding is not regarded as generally injurious: pigs are good forest-gardeners, and they eat worms, grubs and insects as well as acorns. Wild pigs in India do much damage in young plantations however.

[2] Dr. Danckelmann mentions, under this right, that we may take count of the number of head of cattle to be supplied with cut-grass, and check the number of loads, &c., by considering the probable requirements of the known number of cattle. A right of this kind is often valued by petty proprietors who have a pony or two to keep, or a single cow, &c.

"Streunutzung" (for which term I have adopted "litter rights" as a convenient general equivalent). It is "*Boden-streu*" if taken off the ground, and "*Reis-streu*" if consisting of twigs and small branches cut or lopped or gathered from trees and shrubs. *Boden-streu* is again (naturally) subdivided; there is *Rech-streu*, which consists of dead leaves, dry moss, and the surface humus, raked up; *Unkraut-streu*, which means cutting ferns, bracken, heather, and herbage generally, for litter; *Plaggen-streu* refers to vegetation forming a mat or mass, such as half-formed peat, matted roots and close-growing plants, not being regular grass-turf or pit-peat; this is necessarily taken up with a certain portion of soil adhering.

In France, it may strike us as curious that the law takes no specific notice of this dangerous right, nor has it a name.[1]

In the pine and deodar forests of Kulu (Panjáb), they claim rights of collecting humus and dead decaying leaves, which is used directly as manure: sometimes dry stuff is collected and first used as litter, being afterwards put on the fields when saturated with manure in the cattle stalls. In this way lopping rights are connected; for though loppings (from certain kinds of trees only, as *Grewia*, *Pistacia*, *Morus serrata* or Hill mulberry, *Ulmus sp.*) are used to supply fodder for winter use, boughs of pine and evergreen oak are used for cattle litter; the woody parts are ultimately burnt, but the leafy parts, saturated from the stalls, are put on the fields as manure.

In Bombay, the local term "ráb" indicates a plan of gathering (inferior) bamboos, branches, and vegetation of all kinds, and burning them in heaps on the rice-fields.[2]

These rights are of importance because (locally) no money compensation would procure a substitute. Whether "ráb" in Bombay is really indispensable, I am not in a position to say. There are various parts of India (West-Coast districts, also in

[1] In Gerschel's vocabulary of Forest terms in French and German (for use at Nancy) no equivalent is given: *droit de fane* is perhaps something the same, but it is confined to scraping up dead pine-needles, &c. *Soutrage* is applied to cutting heather, broom (*Genista sp.*), furze, &c., to spread on the soil, or otherwise for litter.

[2] Either because the ashes fertilize the soil, or because the heat from the burning benefits the soil and facilitates germination of the seed. In some places it is held (as in the Bombay Presidency) that this ráb is not a right but only a "license." This does not, indeed, make any great difference as long as it is determined to allow the practice; but as it is no doubt one of the local obstacles to forest conveyancy in this part of India, the recognition of the fact that there is no such *right* may be valuable in enabling the practice in time to be stopped, when a substitute can be found.

Chutiyá Nágpur, and doubtless other places) where each agricultural-holding has attached to it a plot of jungle land, with the express object of supplying materials for these (and other) purposes. Most of what has to be said on the subject comes under the head of "Regulation."

The *definition* will consist in describing the nature of the right. In the case of (the really dangerous) right of raking up humus for manure, it may be more difficult to define the extent as to quantity; but in a valuable deodar forest, it should certainly be worth while to ascertain the number of acres of land entitled to be so manured, and it would be possible to do something to ascertain the quantity fairly required per acre; *i.e.*, the number of basket or other loads: this would afford a basis of reasonable limitation and determining the "actual need."

As to lopping: if for fodder, the kind of tree and the places, can be defined. Quantity it is almost impossible to fix. Other matters that are of importance belong to "regulation," and will be noticed under that head.

### (F) Rights to collect Minor Produce.

Rights to collect roots, dye-stuffs and other minor products are rarely injurious (with one exception). It is generally sufficient, after defining the persons, &c. entitled, to describe the material to be taken, the season of collecting, the mode and the locality. Quantity is usually here of less importance: it is always limited naturally. If any valuable drug or dye-stuff is collected, it may be a question whether some small toll or payment should not be required: indeed such is often customary. The object of this is not of course the trifling money-income, but that it affords a means of control, and makes the collectors more careful about grubbing up the soil and destroying forest seedlings.

Resin rights, if they exist, are really dangerous. Here it is possible (and necessary) to specify the kind of tree, and the number of trees to be tapped or notched in the year. But most other matters rather belong to the head of "regulation." In no case can wasteful methods of quickly killing large trees for the sake of resin, be recognised as rights.

### (G) Hunting and Fishing.

I am not aware of any actual *rights* to hunt, shoot or fish in India, at any rate in State Forests of any kind.[1] If such rights are found to exist, their definition would include specifying the kind of game (general or special), the weapons or modes of capture to be used ; and the season. Regulation is here, however, the important thing—to prevent risk of fire and other damage to the forest.

### (H) The Practice of Shifting Cultivation.

No *right* to practise any form of temporary cultivation by clearing the forest exists. But as, in certain remote hills (and other places, too, where the matter is more serious), the practice has been going on for many generations, and among tribes of a peculiar primitive character (*e.g.*, the Karens in Burma), it is not possible to stop it hastily. The Acts (as amended) themselves contain directions as to the requirements in the nature of definition, which consist in recording a statement of the claim (including the number of families or of persons to be allowed), any local rules in force, and "other particulars," and in proposing an area for the exercise. This record has specially to be referred for the orders of the local Government.

It may be desirable, however, to explain further why there is no *right* of this class allowed by law.

As regards *the soil*, the reason is that a temporary and shifting occupation could not give rise to any permanent title. The Land Act (II. of 1876) of Burma adopts this principle, as it allows no right in land in cases to which sec. 22 of the Act applies. The same principle has also been judicially affirmed in India. In the Kánara case, where the claim to a right in the soil was based (among other things) on the fact of "kumri" cultivation, and the

[1] The definition clause makes the term "forest-produce" to include tusks, horns, skins, &c. Some of these may be found lying in the forest and may not be the produce of the chase or shooting. I do not mean to deny the possibility of rights (though none could be claimed on the ground of necessity) but I have never met with any. It is always a matter of pass or licence.

payment of a Government assessment or tax thereon, it was held that this did not amount to any *permanent adverse occupation of a defined area*, which is necessary to establish a right by prescription, in the soil; and that the Government assessment was only a payment in the nature of a toll or tax on forest usages, such as, under other laws, Government imposes, without in the least indicating that any right in the soil is recognised. It is quite unlike the case of regular land revenue, where Government recognises the person who is responsible for the payment of it, as the proprietor (or practically so) of the soil.[1] But further, no right is recognized *as an easement*, to practise such cultivation. No act of destruction or mischief can constitute an easement (p. 84). The Forest Acts specially decide this: *e.g.*, Burma, sec. 11, which expressly declares that no *right* (easement) is conveyed by an order for its practice. The India Act, Sec. 9A (4) is the same.

Let me now briefly describe the practice. The following passage extracted from a note by Sir D. Brandis (then Inspector General of Forests) well describes it. The note relates to Burma; but making allowance for local differences as regards the season of cutting and burning, the size of the clearing, and the length of the period which elapses before the same spot is resorted to and cleared a second time, the extract sufficiently describes the practice as it exists in different parts of India:—

"In January or February, each head of a household cuts down the forest over an area of from three to five acres, burns the timber, bamboos, and brushwood when dry [just before the rains set in], sows paddy [or some other crop] in the ashes, and reaps it in autumn. In the following year he cuts down another plot of forest and treats it in the same manner. Dense masses of grass, herbs, bamboos, and coppice-shoots grow up on the plots which he has abandoned; and after a period, which ordinarily varies from fifteen to thirty years, the forest has grown up sufficiently to be fit to be cut over a second time.

[1] In this case (pp. 512 13), Green, J. said: "The entry of *kumri* assessment . . . . . and its payment for a long series of years does not manifest any estate or permanent right in the forests." And again: "Even if it should be considered that the plaintiff had established a right to have *kumri* carried on" [this is the second question, which the Forest Acts answer in the negative] "such a right would not involve general ownership in the soil."

"This mode of cultivation is not peculiar to Burma: it is practised under the name of 'júm' in Bengal and Assam, is known as 'khíl' and 'koráli' in the North-West Himalaya, as 'bewar'[1] in the Central Provinces, and as 'kumrí' [ponakad, takkal, &c.], in South India. It is, or was formerly, practised in several countries of Europe. As an instance, I may mention the hills of Styria, where it is known under the name of '*Brandwirthschaft*.' On these hills the forest is cut, the large timber is sold, and the tops, branches, and the small stuff are spread over the ground and burnt. The ground is hoed, and oats or rye are sown. Generally one crop only is taken; but sometimes rye is sown the first, and oats the second, year, after which the forest is permitted to grow up again. Under this system of cultivation, the fertilising effect of the ashes produces heavy crops; and as long as the wood was of little value on the hills of Styria, the system was very extensively practised. As, however, the price of wood increased, it was found more profitable to abandon this plan of cultivation, and to let high forest grow up on the ground.

"On the hills of the Pegu Yoma, where the most important teak forests are situated, the Karens, who are the chief *taungyá* cutters in that part of the country, do not in all cases return to their old grounds when the forest on them has grown up sufficiently, but they frequently move to an adjoining valley or to another part of the country; though, as a rule, each tribe cuts its *taungyás* within certain limits, which, however, are wide and undefined. Here the population is scanty, and they have extensive areas to roam over, from which they choose the best places for their *taungyá* clearings. Occasionally, they make plantations of the betel-vine, which climbs up the *Erythrina* tree, or they plant mango and jack trees, or they cultivate a few permanent paddy-fields in the forest; and in such gardens and fields they doubtless must be held to have acquired definite rights of occupancy. But the area of these gardens and fields is insignificant. On the vast forest area in which they cut their *taungyás*, they leave no mark whatever of permanent occupation. There are extensive areas covered with secondary growth of trees and bamboos, which has sprung up on deserted *taungyás*, and here and there the sites of their former villages can be recognised by the half-burnt house-posts in the midst of dense jungle. But these stretches of secondary forest which grows up on deserted *taungyás*,

[1] The term dáhyá is used in the *Central Provinces Gazetteer*, and the term "bewar" also; the latter indicating the strongly fenced plots or fields which result from the process. I have heard, however, that "dáhyá" properly refers only to one kind of this cultivation in which the plough is used. In Bengal "júm" is said to be rather an official than a vernacular term; each locality has its own name.

are separated by large areas of forest which has either never been touched, or which has had time to grow up again into high forest.

"In many cases the Karens return to their old grounds, and in such cases their hamlets ('tay'), though they are shifted from place to place, according to the position of their *taungyá* grounds, remain in one valley, or at least in one district. In other cases they move to greater distances and cut their *taungyás* in old forests. Sickness, quarrels, a visitation of rats, or an unfavourable omen, are generally the causes for a move to more distant regions; but frequently they move without a definite cause, except perhaps a sudden fancy of their 'tsôkay' or headman. It will be understood that, under these circumstances, there is no trace of village areas; there is no attempt at protecting their *taungyá* ground against fire, and no occupancy rights over definite plots of land, except in those rare cases in which they have permanent gardens or paddy-fields. In many other hill tracts of British Burma, the system of *taungyá* cultivation is similar to that which is practised by the Karens on the hills of the Pegu Yoma."

One of the great troubles consequent on this practice is, that the fire from the clearings is allowed to spread in all directions, and mile after mile of forest is annually burnt. Teak and other valuable trees disappear under the process; and the hills subjected to such a treatment, when it is repeated at short intervals, become either wholly barren, or clothed only with the poorest stunted vegetation. It is well known in Burma, that teak has been virtually exterminated over large areas of country by this practice.[1]

There are, however, cases where such cultivation is not only harmless, where it is natural and suitable to the locality, but where its hasty suppression would result in great suffering, and possibly in depriving the Forest Officer of the services of the only tribes who will undertake forest work and furnish guides and helpers. The material destroyed may be in such abundance, that it has far less value than the crops raised; and even if it has value, its utilization and export may be impossible, while the necessity of food production demands its removal. On the other hand, there are cases where the waste of timber is intolerable,[2] where the slopes on which this practice is carried

[1] See Kurz's Preliminary Report on the Burma Forest Flora, p. 72.

[2] A forest officer informs me that he has been able to estimate the value of timber on a jûm clearing in the Gáro hills, cut and destroyed, at Rs. 2,000 to

on, are at the head-waters of streams, and in other localities where the forester knows it is of the highest importance to maintain forest. Here, for the benefit of a few villages or a limited tribal population, the hills are to be denuded, the soil washed off, streams below to be dried up, and creeks once navigable to be choked with silt.[1]

The practical solution of the question is, I venture to think, that adopted in the India and Burma Acts. It is to refuse to create a legal right, which cannot, strictly speaking, exist; and at the same time to make practical provision for settling claims on equitable grounds, and for allowing such cultivation on defined areas and under certain conditions inside the forest or outside, as circumstances require.

Whenever the practice is really dangerous, Government must exercise its right to stop it. Gentle and persevering efforts of sensible officers, will rarely fail to succeed in gradually getting rid of the practice without causing any suffering whatever. It was so extinguished by Sir Mark Cubbon in Mysore; a great measure of success has been attained in the Central Provinces and in Bombay. And always the first step is to make liberal contributions to aid the people in getting seed, ploughs, and cattle, or whatever else is needed to get them to settle down and terrace the hill-sides into permanent fields, or emigrate into the plains where level cultivation is possible. Where the interest of the whole country and its water-supply is bound up in the preservation of forest, as on the Western Ghâts, resolute and persevering efforts directed to this end will generally be successful.

4,000. In this case the land does not belong to Government; but this is only an instance of what well may be the case elsewhere, as regards this one question of the value of timber destroyed.

[1] As in parts of the Konkan. And then it is very easy for writers to draw harrowing pictures of the poor hill people prevented from pursuing the "simple practices of their forefathers" and driven from their sylvan haunts by an army of "ignorant and unsympathetic Forest Officers." The tendency of such pictures, possessing as they do, a degree of truth on one side only, is to inflame the official mind with departmental and personal feeling, instead of directing it to a serious and dispassionate study of the question; it is far wiser to give due weight to the facts (where they are locally important) which necessitate forest preservation, and thereby afford a strong incitement to resolute effort in the direction which is so necessary in such cases, namely, to the best means of establishing permanent cultivation and founding villages in lieu of shifting hamlets and temporary clearing. So long as the Forest Settlement Officer, or other official, is in an uninformed and biassed state of mind on the question, so long he is sure to overlook both the importance and the feasibility, of this remedy.

Where it is not possible or necessary to shut out such cultivation altogether, it is essential that defined blocks should be assigned in the forest area; these must be of sufficient extent to admit of the necessary rotation. It is also essential that attention should be directed to fire-tracing these blocks, so as to prevent the fire on the clearings from spreading to the adjacent forest. That this is possible is amply proved by the practice of the people in the hills between the Sittang and Salween rivers in Burma, to which I have already alluded.

In this connection I must, however, mention a special case originally brought to light by Sir D. BRANDIS. In parts of Burma (the hills between the Salween and Sittang Rivers), there is a curious instance of the complete occupation of land by Karen tribes, who, though they only practise "taungyá," still do so in a manner which leaves a fair presumption of real permanent occupation. The equities of such a case will of course be provided for in due time by the specific grant, or recognition of right, pursuant to rules made. In these cases in fact, we observe a kind of[1] transition stage between shifting cultivation and regular proprietary occupation.

The Madras Act makes no allusion directly to *Kumri* cutting, but it is clear from the wording of Chap. II. throughout, that no right to it would be allowed in a Reserved Forest; nor could such be even claimed. As to Government lands not being constituted forests, the rules (under Chap. IV.) would regulate the matter if necessary.

[1] Sir D. Brandis's own description of these curious villages, and some further remarks, may be found in my "Land Systems of B. India," Vol III. p. 507.

# LECTURE XXI.

## THE DEFINITION, REGULATION, AND BUYING-OUT OF FOREST-EASEMENTS.—(*Continued.*)

### (II.) *Regulation.*

BEARING in mind what has been said in general (p. 309) about the absence of detailed instructions in the Acts, and the means of supplying those which are practically necessary, I may commence this subject by calling attention to a valuable provision, which will enable the Forest Administration to *establish rules* of practice, which can be recommended (1) on the ground of general utility—being conducive to the safe enjoyment of just rights *as well* as the security of the forest that supports them; (2) being consistent with general legal principles concerning easements; and (3) being supported by the authority of the best Continental writers, and by their enactment as law in those countries.

Section 14 of the Act requires the Forest Settlement Officer, in case he cannot provide for rights to pasture or forest produce, by arranging for their exercise *outside* the forest (p. 266), to admit them (as defined)[1] to exercise *within* the forest, but subject to *regulation, i.e.*, he is to direct (and enter in the record) that the exercise is to be—

(*a*) At certain seasons,
(*b*) In certain portions of the forest,
(*c*) And under "such rules as may from time to time be prescribed by the Local Government."

Rules would naturally be made with the advice of professional persons, and might thus formally authorize, what can at present only be argued for and recommended: since the rules would have the force of law (sec. 77). The importance therefore of thoroughly understanding the *limits as well as the requirements*

[1] Or, as the Act expresses it, "to the extent admitted."

of regulation, will be obvious. Here let me recall attention to the remarks already made (p. 321) as to the legal nature and limits of regulation, as not substantially curtailing the easement in its defined nature.

I have to go through the same list of rights as before, assuming that they are all *defined* as to the "personal" or "real" right-holder, and as to the number or quantity, kind, &c., as far as the nature of the case has admitted. We have to consider now, the *mode* of exercise, or, in other words, the use of means, as well as the time and place of exercise.

### (A) Wood Rights.

#### (1) *For Building.*

In general a great deal of difficulty can be removed, in the matter of *wasteful* use of timber (and consequent pressure on the resources of the forest) which is hardly a matter of legal regulation but of executive management. I can only therefore make a passing allusion to the old-fashioned wasteful mode of cutting a whole tree and shaping it with the adze to get one single beam, &c.; and how this can be overcome by giving out sawn timber kept in stock in useful sizes and forms; or how, by establishing local sawpits and freely lending out cross saws, people can be got out of wasteful, and into reasonably economical, habits.

The building-wood right will have been defined to apply to a certain list of buildings that exist, or that have been fairly set down as representing the equipment of the farm, &c., as fully developed (p. 328). Hence the most natural *regulation*, is to require a written application for the actual requirements, whether to *rebuild*, or to *repair*, as the case may be, either as the occasion arises, or when the fixed time for making the requisition (if any has been fixed) has come round. This "indent" or application would be checked by the local officer, with reference to the actual state of the buildings, and what work is required,[1] and with

[1] This is necessary, otherwise a man will ask for "ten trees," and on inspection it will be found he wants to repair a barn for which two trees would suffice, and so forth. I may note that in France, building-wood rights are *always* subject to "délivrance," *i.e.* to the Forest Officer giving the wood (see Code For. Art. 79). And it will be useful to refer to the Art. 123 of the "Ordonnance" for the execution of the Forest Code, as to the indent or estimate for repairs, building, &c. to be submitted previous to the "délivrance." In India we could not do things so completely as that: but a rough estimate can always be made in some way or other.

reference to any particulars in the record of the right as to the time or periodic falling due of a demand. The mode of compliance with the application would depend on the arrangements made in the forest; either to give suitable wood out of a depot, or to direct the right-holder to cut trees in certain compartments where trees might be marked as specially destined to satisfy building-wood rights, or (perhaps most commonly) for the Forest Officer to mark (for the occasion) certain trees which the right-holder may then himself fell and prepare within a reasonable time.

There can be no difficulty in requiring, either by rule or by entry in the record, the use of such applications or "permits," and the procedure for testing their correctness and supplying the wood accordingly.

As a rule, people are not allowed to get a large quantity of wood *in anticipation* of future requirements; but the Forest Officer would use discretion in case of a *bonâ fide* application to have the wood in time to let it season against a real future requirement. Sometimes, too, it may be distinctly useful to invite right-holders to take (if conveniently possible) trees in advance, for future use; as when a storm has uprooted trees, or insects have killed them, and it has become necessary to cut, and so save, the timber; a quantity is thus abnormally brought to stock, and its disposal may be a matter to be desired.

I need hardly discuss the case where a *right* having been defined to have trees to rebuild, say, once in 20 years, and in the *interim* fire or other calamity destroys the house. In Europe the question of insurance comes in; in India I do not think that there would be any hesitation in granting the timber, as a special case, irrespective of the usual period.[1]

(2) *For Industry and Agricultural Implements.*

Wood requirements for implements and industrial uses will not require much regulation. If large trees are wanted for canoes or any other large works, whole trees would have to be applied for, exactly as in the case of building timber. Smaller pieces, as defined in the record of the right, can generally be cut directly, or (in valuable forests) by pass or permit, and in certain places indicated.

[1] As to the German practice, see Eding, pp. 115, 116, &c.

### (3) *For Fuel.*

It has been remarked in the last Lecture (p. 329) that the simple right to have stuff to burn on domestic hearths, ovens, &c., is one that in India will often be impossible to define to as quantity. The *regulation* will consist in requiring that the stuff to be taken (which by definition will not be superior material, or saplings of trees of valuable kinds), should be cut (not hacked) close to the ground,[1] and that it should be taken in the places prescribed. It may be that the cutting of billet-wood will require further supervision, so that it may be stacked and justly distributed among the several right-holders, and the small stuff utilized as well as the larger. It may be even that the Forest Officer himself will prepare and give out, the material by cubic measurement. Whenever the cutting is done by the right-holders, it will be required not only that they should cut properly so as to allow of coppicing, but also that the areas cleared should be closed for a term against grazing, so that they may grow up again.[2]

As to cutting resinous wood for torches, the only remark needed is that where, besides actual stumps from old cuttings (which will gradually disappear) certain badly grown or dying or deformed coniferous trees, are allowed to be chipped away for torches (the right is called "jugni" in the Himalayan Forests), such trees must be marked with a *distinctive forest mark* indicating their destination to this use.

Where the right consists in getting some material for conversion or subjection to some process, as boiling, calcining, &c., there is danger of fire to the forest, so that the right-holder would have to submit to making his kiln, boiling furnaces, &c., only in such places as the safety of the forest demands; and these places will be prescribed, or left to the Forest Officer to arrange for the time being.

In some cases, the burning or distilling requires a separate

[1] Or otherwise, according the species, *e.g.* "Jand" (*Prosopis spicigera*) can be cut out with the root-stock as well, and it benefits reproduction.

[2] In the course of time, it may be possible to make more regular arrangements for working firewood rights: in that case it will be useful to refer to the French practice (see Code For. Art. 81, 105, and the "Ordonnance" Art. 122). The "coupe" is arranged for; and one person is put in charge, to cut the whole properly, and to supervise the distribution of the different sizes of wood among all the right-holders, according to their known requirements.

supply of brushwood, &c., for firing; in others not (*e.g.*, in cutch boiling the cauldrons are heated with the twigs, branches, and used chips of the stems of *Catechu* that are cut up to boil). If fuel material has to be given, its collection will be regulated in the same manner as that of household fuel.

### (B) Pasture Rights.

We have already spoken of the definition of number and kind of cattle, and the season at which grazing is required—in the nature of the right. Under the head of *Regulation*, come several important considerations:—

(1) As to the possibility of excluding dangerous kinds of cattle—goats, camels, elephants.

(2) As to the general question, with reference to different styles of forest and kinds and stages of growth, of the *yield* of grazing, and the *area wanted per head of cattle*.

(3) As to the closing of certain *proportions* of the whole forest area, because of seeding, or young growth, or because of a bad state of the forest.

(4) As to general protective measures, such as requiring *grazing tickets* on which the kind and number, admissible under the right, are noted; requiring *cattle-bells*, which call attention to straying cattle; requiring a *responsible herdsman* to be in charge; restriction about lighting fires, and as to making shelter-huts, sheds, and enclosures in the forest.

(5) General considerations as to arrangement of forest-growth and cultivation, with reference to grazing, and other, rights.

Under such heads as these it will at once strike the student that there are many matters of technical forest science and practical forest management and protection, involved; and the same remark will be applicable to questions arising in connection with the litter-right, the collection of resin, and some other forest practices. It is therefore quite possible that a number of points may be omitted; but enough is said to indicate how a rule or specific order on the subject (when needed) can legally be made.

(1) It is under this head that we must consider the possibility

of the F. S. O. declaring certain kinds of grazing to be incompatible with the "due maintenance of the forest," and therefore refusing it, *and* (in the absence of any other provision), awarding compensation instead, as he is empowered to do by sec. 15.

Elephant grazing is so rare as practically to give rise to no difficulty. It consists in letting the elephants themselves tear off certain kinds of foliage, or in their keepers cutting boughs for them. *Dillenia sp.* is (*e.g.*) a favourite tree for elephant feeding.

Camels are, fortunately for forest interests, only found in parts of India, and mostly in places where a desert, scrubby growth renders it impossible to secure forests for any higher purpose than fuel-coppice. Nevertheless, in North India and elsewhere, these fuel forests are of great importance. The fuel-supply, not only of towns, but even of lines of railway, may be more or less completely dependent on them. Unless in such localities there happens to be an under-growth of such plants as camels eat (*salsola*, *coronylon*, &c.), camel-grazing means simply browsing on the top-shoots and twigs.

*Prosopis spicigera*, which forms large forests in the plains of the central Panjáb, is an especial favourite with camels. Nor is it possible to prevent the herdsmen aiding this "grazing" in a peculiarly dangerous manner. As the animal does not like to stoop to eat, the herdsman attacks the leading stem of each tree with a billhook on a pole; he half cuts through the wood and then bends down the bough, of course tearing a long strip of bark and sapwood with it. The animals then reach and nibble at the hanging boughs.

No forest can possibly survive camel-grazing for long. In the case of the dry forests of *Prosopis*, this species is so deeply rooted, that it long continues the struggle; but in time the stems become gnarled and stunted, and even it must at last succumb. Camel-grazing cannot, therefore, be allowed in any permanent fuel reserve, or in any dry forest of the lower hills.

It is best to give up tracts in the interior (as in the Panjáb "bár") to this purpose. Camels are in fact quite incompatible with a highly-cultivated district, and can only be reared successfully in the "bár"[1] and in desert countries.

[1] The term "bár" is applied (in the Panjab) to the tracts in the centre between two rivers. The level is somewhat high and water in wells is not only frequently brackish but is not reached till a considerable depth is attained, so that wells for irrigation, and therefore cultivation of fields, are impossible.

Goats are hardly less injurious: no forest can long survive their attacks. Many species, which they do not eat, they nevertheless nibble at. The roots and stalks of vegetation also do not escape them.

"These animals," says Meaume [1] (without the least exaggeration), "are the scourges of the young forest; they destroy all hope for it. They paralyse reproduction, and a young tree once browsed must be cut back to the root if it is ever to recover."

By the French law (Code For., Art. 78) the grazing of goats in a forest is prohibited, "notwithstanding all rights and actual enjoyments of the practice to the contrary." This prohibition is of very ancient date. It is found in the 15th article of the celebrated Forest "Ordonnance" of 1669.[2] In the days of Francis I., a law of A.D. 1541 recites still earlier laws having the same object.

In England, Manwood,[3] speaking of the ancient times, when a "Chief Justice in Eyre" went his rounds to try forest cases, and took the opportunity of charging the Forest Officers as to their duty, tells us that one of the things which the Justice noticed was the subject of goat-grazing. "You shall enquire if there have been any * * * * * goats that have been attached since last session within the forest; of the number and price of them you shall do us to weet: for they be forfeitable by the forest attachment, for they be no beasts of common."[4]

The German authorities are also quite clear. Not only are

[1] Vol. I., p. 424, sec. 354.

[2] Which did not allow goats even in "*places vaines et vagues*" (bare spots) on the borders of the forest, for fear they should stray into it.

[3] Cap. 24, p. 521.

[4] The same author (p. 222) records that, at the assizes of the forest of Lancaster (in Anne 10, Session 1), the townspeople claimed a right of grazing in the forest and got it. But it was then held for law that neither sheep, swine, nor goats are allowed to have common within the forest. And in the "*Assisa Foresta de Pickering. fol.* 67," it is also decided "that no man may common with goats in a forest."

It is probable that these early laws in England prohibited goats because they interfered with the forest for hunting purposes, or because of certain technical definitions. And Williams says (p. 168), that there might be a *custom* that goats grazed with other cattle on a common (though such a custom would not be possible in a forest). But still the existence of such a rule, long after the older barbarous forest laws had been swept away, shows that there has been always recognition of the fact that the lower interest must give way to the higher; the selfish pleasure of the chase may indeed have been a very poor representative of a higher interest, but the benefit to the whole country by forest protection is a

goats forbidden by the Austrian law, but the 65th Article provides that if goats are found trespassing in the forest, and cannot be caught and taken to the pound, they may be shot. Von Berg[1] says that "nearly all the German States, and most rightly so, prohibit goats in a forest."

The Italian law does not expressly forbid goats; it probably considers the power of getting rid of rights, by compensation, sufficient.

In India, no Forest law has as yet specifically prohibited goats. But there is the general rule that rights inconsistent with the maintenance of the forest are to be commuted. As the foregoing authorities show that goat-grazing is regarded as inadmissible in nearly all countries where natural forests are properly cared for, it may certainly be concluded that a Forest Settlement Officer in India will, as a rule, be justified in deciding that goat-grazing is inconsistent with the maintenance of the forest, and directing its commutation. But it should be remarked that this is not always necessary, and that where other plans of arranging for goat-grazing can be devised they should be followed. There may be cases where it is a question of a few goats only for a household. The goat is often the "poor man's animal," and where provision has to be made only for a limited number in the village, it is practically easy to give up a small corner of forest for the purpose. Where the herds are large, and there is no grazing ground, or only of limited extent, then the sooner the people change their habit the better. It should be borne in mind that where a population voluntarily establishes a state of things which is inconsistent with natural conditions, nature will sooner or later avenge herself, and compel the abandonment of the practices that oppose her. It is of no lasting advantage to give up the forest, because the goats will soon cause it to disappear; and then *exactly the same result* will follow, as if the Forest Settlement Officer had refused to burden the forest in the first instance: the goats *must* go;

really higher interest. The French law, from the very first, seems to have been *bonâ fide* for the protection of the forest.

[1] Pages 215, 219, and see Eding, p. 89; Prussian Grazing Regulation (22nd November, 1838); Ronne, pp. 421 and 794. Eding mentions that goats are allowed in Prussia in places where they can do no harm.

only that then the public will have been injured, perhaps irretrievably, by the loss of the forest as well.

I am well aware that it is much easier to write things of this kind on paper than to make satisfactory arrangements in a given forest. But principles must be stated, and there can be no doubt that if Forest Settlement Officers once really understand the truth, and appreciate the facts stated, the difficulty of making an arrangement will appear less formidable than it does when the mind still retains the conviction that goat-grazing does no harm.

It is always, as I have said, possible to provide for a few household goats: herds kept for milk on a small scale, or even sufficient for the supply of a large town, certainly *can* be maintained outside a forest, for they are so, constantly, in places where no forests exists. Large herds such as those of the hill "gaddís" *can* only exist when "Alpine" pasture grounds are available.

In France, sheep are prohibited as well as goats; but with the proviso that special permission for their grazing may be given. In England, as the previous notes show, sheep, as well as goats, are excluded from "common of pasture." In some German States sheep are allowed if there is grass.[1]

They may be regarded as less noxious than goats, but should be prohibited wherever possible, unless grass is abundant.

Buffaloes cannot always be excluded; but they are very dangerous, especially on steep slopes, where their heavy tread lays bare the roots of trees, cuts up and turns into mire the soil when it is wet after rain; and may even give rise to small ravines or water channels, which deeply indent the soil. This fact must be borne in mind in fixing the *parts* of a forest in which such grazing is allowed.

(2) In India it is often the case that the (defined) grazing rights are not sufficiently numerous to prove a source of real difficulty: we have indeed, as yet, no *data* for exact knowledge; but if the area is large and the cattle not very numerous, we can fairly assume that the rights are not injuring the forest, especially so long as a certain number of compartments, or locally known areas, can be kept closed in turn.

But it will become more and more necessary to study this

[1] Von Berg, p. 219.

subject, because whenever a question of pressure on the forest arises, and there is a consequent necessity for *reducing* the *number* of grazing cattle, or of buying out and compensating the rights, we shall want *data* on which to judge of the necessary reduction, as well as for calculating compensation.

It is obvious that forest areas differ in their grazing capacity, according to *soil* and exposure, as well as according to the nature of the tree growth (*e.g.* in conifer forest there is less grass and herbage than in open deciduous forest); and according to the closeness of the stock, its height and spread of crown. I do not think we shall for many years to come, arrive at any elaborately minute results of experiment and observation. But it will be possible to attain a good deal of practically useful knowledge, which will serve as a basis for rules, or for special orders, as to the number of cattle that can or cannot be safely admitted.[1] For example, attention might be directed to enquiry as to practical (relative) grazing values.

(*a*) In these matters it is convenient to adopt some one kind of cattle (that most in use) and regard one head of that kind, as the standard or unit, *e.g.* one cow.

(We should not attempt in general to distinguish between plough and draught cattle, milch-cattle, and cattle for fattening.)

(*b*) With this unit to deal with, it is only necessary to ascertain that other kinds of cattle represent an equivalent to "one cow," or more or less than one. Thus if $x$ is the area sufficient for one cow, $x \times 1{\cdot}5$ might be that for a horse, $x \times 1{\cdot}2$ for a plough-bullock, or $\frac{x}{10}$ will suffice for one sheep, and so on.[2]

(*c*) To divide the forest lands locally into a few broadly differing classes, and to start experimental plots with a view to testing how many cattle of each kind the various classes will fairly support. It may be possible to express the relative grades of excellence by number:—thus if 100 represents the best grazing

[1] It is obvious to remark, that if an excessive number of cattle are introduced *in open compartments* (and putting aside the question of closing areas for growth and reproduction), the animals will be badly nourished, and in their hunger will gnaw at the very roots of the grass and herbage, and so injure the reproduction for the next season's grazing. They would thus be driven to eat up everything, seedlings, &c. which, were a proper supply of grass growing, they would pass over; and hunger may drive them even to reach up to, or tear down, young stems and destroy their foliage.

[2] For some French statistics see *Revue des Eaux et Forêts*, January, 1881, p. 5; 100 hectares is the average for 40 head of cows or horses: (10 sheep = 1 cow), this gives about 6·25 *acres* per cow.

in open glades with no trees, then each compartment with few or many trees, may be expressed by 75, 60, 45, &c.

I cannot, within any proper limits, go further into this question, which is dealt with fully by Dr. Danckelmann.[1]

Until *data* are available, all that can be done at present is to have a good inspection of the forest, and allowing that an assumed fair proportion (of this presently) is available to be *closed*, the general excellence or inferiority of the grazing can be stated, and we must make the best estimate possible, that four or five acres—or whatever it is—will be the average requirement per cow or other equivalent head of cattle. On this basis the number of cattle and the arrangement of open areas must be effected. If there are more cattle to graze than the acreage will support, then there will arise a question of exclusion, and possibly of compensation (which will be discussed hereafter).

(3) If the forest is in an abnormal (bad or ruined) condition, first there must be provision made for allowing a certain number of blocks to be closed successively; and this can only be determined in each case locally, and after study of the ground. It is impossible, on general principles, that any grazing rights can exist which would prevent the Government (as owner) from restoring a bad forest. In this case I need only refer to the possibility of allowing *grass cutting*, as a compromise, when this can be safely done, although the compartments are still not fit to have cattle turned in.[2] But apart from the question of restoring forest that has been ill-treated,[3] there is always the principle that no right can be allowed to prevent a normal management of the Forest Estate, *i.e.*, one proper for the kind and class to which the forest naturally belongs. This has been discussed (p. 295*ff*), and we have laid down the limits; we do not therefore refer to cases of a *total conversion*, or some very *special form of cultivation*; in either of such cases, grazing could

[1] Vol. II. p. 368ff. The author remarks, however, (p. 373) that the application of the "*neue Futterungs-lehre*" to calculations of forest-pasture, is a limited one.

[2] Under the French law of "reboisement," &c., arrangements are sometimes made for growing fields or plots of forage-plants and herbage, to diminish the grazing difficulty (see Appendix B. to Lecture XVI. p. 252).

[3] This matter is of great importance in India, because it will often prove to be the case that areas are not placed in charge of the Forest Officer before they have become half ruined—nearly always by *abusive treatment* of the neighbouring villagers, by over-grazing, burning, careless lopping, &c.; and then the first steps in forest management will be restorative ones.

not be limited without making special arrangements, or paying compensation. We are solely concerned now with a forest in a fair normal condition, and worked in the usual way. That working always contemplates the reproduction of the forest; and that again involves areas in which seed is germinating (or young plants have been planted out artificially) and where young (natural) growth is rising up, and will only gradually attain a height and strength when it is safe from the attack of large cattle (it will take much longer to be at all safe from goats). Strictly speaking, in a perfectly regular forest, with a given period of rotation and a known acreage, it is a matter of exact calculation, what proportion would be under the "tender" age classes. But such a state of things is not often found in India, and especially not where the practice has long been to work by a widely distributed, irregular, selection-filling (*jardinage—Planter-hieb*), so that trees of all ages and of large and small growth, are scattered over the whole forest. It will then depend on a local study of the tract about to be demarcated and settled, what compartments must be closed (*mise en défens*) for a long time to come, and what for a lesser time, and what may be opened at once (see remarks under the head C, p. 359).

But it is important to observe that in some cases, even this cannot be done at once; and it may therefore be absolutely necessary to prescribe that the grazing is to be carried on in compartments which are to be declared "open" *for the season* by the Forest Officer (subject it may be, to some sanction or approval). The arrangement must be made so as to leave these open compartments in reasonably convenient situations from the graziers' point of view. But it is absolutely useless for the F. S. Officer to determine certain parts of the forest which are *permanently* open to grazing, and other parts which are *permanently* closed. Such an arrangement would be in reality an adoption of the method prescribed by the Act when it endeavours to provide for the rights *outside the forest* (p. 266). The only result of such a plan—if intended to be a mode of adjusting rights for exercise *in* the forest under sec. 14 (c)—will be that the *permanently* open compartments will not only be visible on the map,[1] but on the ground, by the increasingly denuded aspect

[1] *E.g.* in the Hazára forest maps. But Hazara was not settled under the Act;

of the surface; and in time they will cease altogether to support the rights which it was *supposed* were being liberally provided for!

As regards the question of the proportion of forest-area which has to be declared unsafe for grazing, in India and the Colonies, the data of European forests can only be quoted as an illustration of the method in which questions of the sort may be settled, and as an indication of the information we shall gradually require to possess ourselves of.

The French law, as to the extent of forest to be open, is very simple. The Code (Art. 67) declares that grazing can go on only in those "*cantons*" or portions of the forest declared by the forest administration to be "*défensable*," *i.e.*, out of danger from grazing. A list of cantons open to grazing is published every year, and if any one contests this[1] he can do so by reference to the "*Conseil de Préfecture.*"

In most of the German States, the rule is that grazing rights may be kept out of those parts of the forest where the growth is so young that the tender shoots are in danger of being broken or browsed.[2] Long experience, however, has in these countries, enabled an *age of safety* to be laid down for each different kind of forest. Moreover, as forests are under regular treatment, it will usually be a definite and known proportion of the forest area that is of each age. Hartig[3] gives the following list of ages at which the forest is safe:—

| | |
|---|---|
| High forest (deciduous) . . | 20—25 years (according as the rotation is 80 years or 100 years). |
| Coppice (25 years' rotation) . | 8—10 ,, |
| Pine forest . . . . . | 13—16 ,, |
| All blanks re-stocked . . | 20—30 ,, |

and those portions were therefore intended to be on the analogy of those provided in the Act as *cut off from the real forest.* The danger of this kind of provision is, that such areas afford a present solution to difficulties which may even suffice for some few years; but if these areas are subject to no care at all, they will in time become barren and useless, and what will the right-holders then do?

[1] *E.g.*, objects to the propriety of the Forest Officer's decision as to the necessity for closing some places; complains that insufficient allowance for grazing rights is made, &c.

[2] Roth, § 266, and authorities quoted; Eding, 185.

[3] Quoted by Ronne, p. 717.

Hundeshagen's table[1] is according to quality of soil (which affects the rate of growth) :—

| | Against large cattle | | Against sheep. | |
|---|---|---|---|---|
| | Good soil. | Bad soil. | Good soil. | Bad soil. |
| | Years. | Years. | Years. | Years. |
| 1 Beech and oak high forest (other deciduous forest a little less.) | 18 | 24 | 14 | 18 |
| 2 Beech (simple coppice and with standards). | 14 | 18 | 10 | 12 |
| 3 Oak ( do. do. ) Coppice of other species a little less. | 10 | 14 | 7 | 10 |
| 4 *Abies pectinata* and *A. excelsa* . | 16 | 20 | 12 | 16 |
| 5 Pines and larches . . . . . | 12 | 16 | 9 | 12 |
| 6 Poplars, willows, &c. . . . . | 6 | 9 | 4 | 6 |

The Saxon law[2] goes by the *height* of the young trees. Thus, the forest is closed against—

| | | | |
|---|---|---|---|
| Horses, | till the trees are | 6 *ells* high | (about 19 feet). |
| Horned cattle, | do. do. | 4 *ells* high | (about 13 feet). |
| Sheep, | do. do. | 2½ *ells* high | (about 8 feet). |

Hartig[3] fixes the height that is secure (from the same kinds of cattle) at 13, 9, and 5 feet respectively.

It will be readily understood that in all forests which are in a normal state of growth, a regular graduation of age classes will have been already attained, a certain proportionate area being occupied by each age. Consequently, if you have fixed an age at which the compartments are safe from damage, it is easy to point out what compartments are open, and will successively become so; and these will always be a more or less definite proportion of the whole area of the forest according to the rotation period on which it is being managed.[4]

(4) One of the generally protective measures will be to regulate

[1] von Berg, p. 280, &c.

[2] Mandat of 1813, § 8.

[3] *Forst und Jagd-Staatsrecht*, p. 175. Eding remarks on this, that height is not always a sufficient test, as oxen are in the habit of bending down young stems and eating off the leaves.

[4] Supposing a regularly-stocked pine forest to be worked on a rotation of 120 years, it is obvious that trees aged from 1 to 20 years will occupy one-sixth of the whole area; and if pine trees must be protected against grazing till the 17th, or, say, till the 20th year, about one-sixth is the proportion of a normal pine forest managed on such a rotation, which will always be under closure. A deciduous coppice will probably have a rotation of 30 years; then as coppice trees will be unsafe till 10 years old, *one third* of the area, stocked with young trees 0—10 years old, will be under closure. An irregular or badly-constituted forest, would, of course, require a much larger area closed.

the *season* of grazing. It will be observed, that *season* is also mentioned under *definition*, for it is sometimes a natural feature of the right in itself, that the grazing is only wanted (as in Burma) for certain months (usually in the rains). It is, however, in some cases desirable to deal with the question as a matter of *regulation*; it may be possible to turn all cattle out of the whole or part of the forest, for certain months, just when a particular stage of growth is going on, and the like; (*e.g.*, in the Hushyáipur bamboo forests, the custom has always been to exclude cattle just for the month when the young bamboo shoots are tender). It may be also that in forests in the hills and elsewhere, the cattle are out of the forest during winter, and they must not be re-admitted too early in spring before the grass and herbage has *had time to get a fair start*.

A few other matters remain, which I have found noticed in the European text-books, and which may afford useful hints for Indian Forest Settlements.

It almost goes without saying, that where grazing is admitted, unless the grass is so superabundant that no diminution of the grazing would be caused by the practice, neither the forest-owner nor other right-holders, can be permitted to spoil the grazing by cutting the grass first.[1] Most laws require that a responsible herdsman should be appointed. In India, children are often sent out with the herd so young that they cannot be held liable for trespass, nor have intelligence enough to control the herds. Cattle *bells* are useful.[2]

Portions of the forest that are closed, must, if possible, be protected by ditches 4′ by 2½′, over which cattle cannot pass; or at least marks (such as bundles of grass tied on to stakes driven into the ground) should be put up to warn graziers of the prohibited places.[3] The forest-owner is bound to provide a proper way for the cattle[4] to get to the open parts of the forest, and should take the precaution of fencing or otherwise keeping the

[1] Eding, p. 92.

[2] So in the Austrian law, and in Prussia (Ronne, p. 717, &c.), cattle bells are also required, and herdsmen must keep together, so in the Bavarian Law of 1852, section 43, and the French Code, Forest, Art 72. Art. 73 requires cattle to be marked with a special mark for each commune or right-holder, and Art. 75 requires the use of cattle bells.

[3] See Grabner, as to this provision of the Austrian law.

[4] Saxon Mandat, § 11, and Roth, § 271.

cattle from wandering off the way provided.[1] If the owner does not fence, the cattle-owners will not be responsible for trespass, unless it can be shown that they were guilty of negligence. The routes prescribed for access to grazing areas must be reasonably convenient; but cattle owners cannot complain merely of having to take a little more circuitous route to avoid the closed places.[2]

Lastly, I may remark that the erection of sheds or huts in a forest is generally prohibited; but the Hazára Regulation 1879 contains a reasonable provision that graziers admitted to a forest may temporarily put up such sheds as may be required for the purpose of shelter during the grazing season. The construction of booths and sheds must not, however, be made an excuse for cutting young trees of any value, or lopping boughs, without permission. As fires are often lighted in these sheds or near them, either for the grazier's use or to make a thick smoke and drive away flies from the cattle when at rest, precautions must be taken that the forest is not set in a blaze.

In Europe cattle usually leave the forest at night, and I observe that the Bavarian law[3] expressly prohibits pasturing cattle at night, *i.e.*, between sunset and sunrise. This provision could not be adopted, in the higher hill forests at any rate, but certainly should be insisted on in valuable plantations in the plains.[4]

### (C) Grass-cutting.

In India, as I have said, grass-cutting may be conveniently allowed as a substitute when grazing has to be excluded. Cutting grass with a sickle or plucking with the hand may be harmless when cattle grazing would be impossible. Grass-cutting is not, however, entirely free from danger. Though a grass-cutter can avoid touching tender seedlings or new coppice shoots, he rarely does so. Moreover, in some cases, removal of the grass and herbage uncovers the soil and takes away protection from seedlings. The removal of thatch grass and other

[1] The French law (Art. 71), requires the route to be fixed, and, if need be, fenced or ditched at the joint expense of the forest-owner and the right-holder. We could hardly apply this rule about the expense, in India.

[2] On this see Grabner, Austrian Forest Law, § 10.

[3] Law of 1852, Art. 43.

[4] The head (5) noted at p. 348, is reserved to the end of the Lecture.

tall and coarse species, on the other hand, may be an advantage, but this would not be wanted by graziers.

Speaking, however, of ordinary grass-cutting, it should be excluded from portions of forest where seedling growth is expected or has recently begun; and the same in compartments beginning to coppice.[1]

The Saxon law [2] protects against grass-cutting or plucking—

| | | |
|---|---|---|
| Simple coppice, | till | 5th year. |
| Coppice with standards | ,, | 7th ,, |
| High forest | ,, | 11th ,, |

Eding [3] gives nearly the same periods. The object of giving the coppice with standards two years more growth, appears to be that the best stems, which are likely to be kept as the standards, may get a good start. In Europe, the necessary caution is added that *scythes* are never to be used. It may be convenient to require that the grass be cut on certain days when a Forest Officer can be present to supervise, if any risk is apprehended. The remarks made under the last head (grazing) as regards *season* apply also to this.

### (D) and (E) Lopping—Litter Rights.

In the case of lopping trees, regulation will easily be arranged, respect being paid to the purpose of the lopping. It may be needed to point out *compartments* in which alone lopping may be done; or it may be that the defined *species of tree*, wherever found, may be lopped, or there may be certain local limits. The most important matters usually are—

(1) To determine how often—once in two years, once in three (in *no* case in two consecutive years)—the cutting is to be.

(2) How high up the stem the lopping is to go, so as always to leave a fair crown—or the tree will be sure to die.

[1] And of course, in all places taken up for reboisement work. Here, the first thing to do is to cover the ground with *something*, and every form of removal of herbage has to be strictly interdicted for a term of years. In dealing with such places, if hardship is caused to villages in the neighbourhood, one of the first steps is to select suitable plots on which to sow hardy and quick-growing fodder plants, or even grass.

[2] Mandat, 1813, § 31 (Qvenzel. p. 206).

[3] Eding, p. 94, where the author also alludes to some old laws of the 17th century, which fixed an age of 8 years uniformly for all forests.

(3) To confine the lopping to *smaller* boughs and not to thick limbs or branches [1]—for the same reason.

(4) The season to be fixed; *i.e.*, *after* the full year's growth has been attained, and *before* the leaves begin to turn colour. In fact the people themselves know this, and by custom lop *after* the rains, when they begin to store the fodder boughs in racks for winter use.

In the case of the "ráb" cutting of Bombay (p. 336) special local rules will be found.[2]

These matters are all within the scope of rules or orders that can be made under the Act. I may mention that there are hill forests where tree-lopping is a matter of *necessity* to the people; and it may be worth while, if the forest is seriously threatened by it, to plant special belts of the quickest growing and most useful trees, on purpose to be lopped (of course not before the belts are sufficiently grown).

The right to collect *ground litter* is not very common in India; but as it is "the most injurious of all forest rights" (Pfeil), it demands attention. As practised in the Himálaya, it includes not only the dry moss and vegetation (which is of comparatively less consequence), but scraping up the decayed damp leaves and the humus soil, unavoidably destroying all soft and germinating seed, and any seedlings that have not got firm enough hold on the ground to resist the rakes or scraping tools, or pass through them. The soil itself is also so seriously injured as to be ruined in a comparatively few years.

It will be remembered that the removing of the humus layer has a double effect: it diminishes the nutritive properties of the soil and the supply of the acids, &c., which convert the mineral constituents and prepare them for plant support; it diminishes the soil moisture,

[1] Danckelman mentions a maximum thickness (*stark*) of 1·5 centimetre or about 1¼ inch in diameter.

[2] Ráb, where allowed at all, is variously regulated in Bombay. In some places (for instance, in the Mahábaleshwar Five-mile Reserve) people are only allowed to cut six kinds of *annually growing* vegetation in the forest. In Kolába and elsewhere, they are allowed to cut all herbage and to lop 23 kinds of trees. In Thaná, all trees but 18 reserved kinds, may be lopped. When I last heard, it was intended to regulate ráb cutting by opening and closing blocks in rotation. In some places (as in the Konkan) the fields themselves are manured with refuse fish, or by folding sheep during the winter on the land, but the nurseries in which the young rice plants are reared are manured with ráb. First, a layer of dung is put on the beds, then grass and bushes, then some pulverised earth, and grass over all. This is burned and dug into the ground. It is, however, found in the Conservatorship of the North Division, quite sufficient that herbage, not trees, should be cut.

and its capacity for retaining or sucking up the rainfall and dew. The preservation of the soil is the life of the forest; hence any right that attacks the surface soil is beyond measure dangerous.

Nevertheless, this right may be indispensable; but the question has not been studied. It may be that no money substitute would enable the people to *buy* any other manure; but whether the local cattle-manure and stall-litter could not be made to suffice, is another question. As these rights are not numerous, I do not propose to go into detail as to their regulation,[1] but just give the heads:—

(1) *As to place*:—

(*a*) Each area cleared must have one or more years' rest afterwards, according to the state of the forest and the climate: never allow removal of humus in two consecutive years from the same place.

(*b*) Certain areas to be permanently closed; viz., steep slopes, places where the soil is thin or very poor.

(*c*) To close compartments with young growth; or for three years before reproduction-cutting begins.

(Some laws in Germany prescribe the *age*—*e.g.* in Baden, deciduous high forest compartments are not to be open before 40 years of age; pine forest 30 years; hardwood coppice 15 years; softwood coppice 12 years. In Hesse, the law prescribes the *proportion of the total area* to be closed: *viz.* 6–20 p.c. of conifer forest, and 5–14 of deciduous.)

To regulate rights efficiently under this head, the whole forest needs examination, and a special scheme to be drawn up for closing and opening compartments or blocks. Such a plan may provide for 5—10 years to come, or more according to circumstances.

(2) *As to season* (this depends on the kind of forest):—

(*a*) The best time is from *late summer* to the *middle* of the time of maximum leaf-fall. This gives last year's (decayed) leaf-fall, and some of the new; and yet gives the soil a chance of partly recovering, by the effect of the *remainder* of the leaf-fall[2] which comes down *after* the clearing.

[1] To do so would be to take up too much space to little purpose; for in any forest charge where such rights are really burdensome, the student will naturally go to the German books in which he will find all details at first hand. (Danckelmann, Vol. II. p. 275 ff. and among the older writers, Pfeil, p. 57 ff.)

[2] See some account of the interesting experiments at Eberswalde, in Danckelmann, Vol. II. p. 298.

(3) As to *mode* or means of collection :—

(*a*) Always to be collected under supervision; on *certain days* (choose those on which collection of dead wood, &c., is not going on). To show 'right-tickets' which mention the number of loads, basketfuls, &c., to be taken.

(*b*) Not to use close-set iron rakes or spades or scrapers; the best tools are blunt wooden rakes, with teeth two inches or more apart.

In conclusion I may just mention, that it may be worth while in some places to plant areas of the quickest growing pines or other trees *on purpose* to yield this manure; but that is not a matter of legal rule or order. But if such places were suitably found, it would be lawful to exclude the practice from the forest in proportion as the supply could be obtained from the special plots.

### (F) Rights to collect Minor Produce.

The remaining kinds of right to forest produce will need but little regulation, with the one exception, *i.e.*, where tapping for resin, rubber, wood-oil, and natural varnish, are concerned. I cannot, in view of our purpose to study law, go into the technical details about *resin*-tapping, what is the best form and least destructive mode of taking it; that is learned in special treatises.[1] But I have already remarked generally, that no right can exist to collect resin in such a way as to kill the trees outright, as used to be done with the Sál (*Shorea robusta*) in Bengal. As a rule, the practice may be confined to special groups of trees set apart; and then on the understanding that the form of notching (or taking off strips of bark) is prescribed, as well as the number of notches, the periods of repetition of the scoring, &c. In high forest, coniferous trees cannot be successfully cultivated if the resin is taken out; the growth is retarded, and the quality of the timber is injured. Consequently, a limited amount only can be taken from trees *which have attained their growth, and are going to be felled* within the next few years.

In Burma, the *wood-oil* of *Dipterocarpus*, and the natural

The percentage of total leaf-fall in the year is smallest in February and March; increases in June, and attains a maximum in September and October; after which it rapidly diminishes.

[1] See, for example, in Gayer's *Forstbenutzung*.

varnish of (*thitsi*) *Melanorrhœa usitatissima*, are in great demand.[1] India-rubber is always collected under special rules.

The collection of roots of drugs, dye-stuffs, &c., may call for some regulation, so as to prevent forest-seedlings being injured: but here, rules requiring *passes* and the collection under supervision, and on certain days or at fixed times, will be usually all that is required.

### (G) Hunting and Fishing.

These are not rights (or not usually so). Any regulation that is needed, can be made under the authority of sec. 25, for Reserved Forests (or sec. 31 in the so-called "Protected Forests"). Where there is no right, the acts may be prohibited altogether (if necessary); and then every breach of the rule will be punishable.

Regulation in this case looks—

(1) To the *safety of the forest* from fire, and trampling of seedlings, breaking of fences, &c.,

(2) Exclusion from certain parts of the forest requiring special protection,

(3) Seasons of rest, for the *security of the game* itself (*e.g.*, months of breeding),

(4) Prohibition of certain weapons or modes of hunting; and in the case of fishing, prohibiting certain kinds of (small-meshed) nets, poisoning water, setting fish-traps, &c.[2]

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In conclusion, I have to remark on a subject which was noted at page 348 (head 5) but which refers to rights of all kinds, and so was reserved to the last. I refer to the possibility of adopting modes of cultivating and working a forest, with the express view of providing for existing rights. This may have a

[1] See the process described in the *Indian Forester*, Vol. I. p. 364. In Burma, I understand, the rule is that "Kanyen" trees may not be tapped under 6 feet in girth, "Eng" not under 3 feet, and *Melanorrhœa* (which is naturally a smaller tree) not under 2½ feet in girth; and the number of notches in the season is limited,—only one for smaller trees, and up to three for the larger.

[2] In both France and Germany, hunting and fishing rights are elaborately regulated by law. Those who wish to enquire into the subject may refer to Danckelmann, Vol. II. There is a brief but good account in Eding (8th Abschnitt, p. 204). The pocket edition of the French Forest Code also contains *Code de la chasse*, *Code de la louveterie* (killing wolves and noxious animals), and the *Code de la pêche fluviale*.

practical bearing on the question of regulating, and of getting rid of, easements. And it is evident, that in view of the legal difficulties about dealing with rights which are *in excess of the power of the forest to satisfy*, and in view of the local importance of rights,—these being sometimes almost, if not quite, *indispensable* to village life—the subject is one that requires careful study at the hands of the Forester. Every easement, as a matter of principle, has to be exercised so as not to interfere with a normal business-like management of a forest of the class that is represented by existing conditions; but on the other hand the owner has to adopt such form of management as will not curtail the rights unreasonably. It is quite within the bounds of possibility that a forest might be worked so as to make provision for grazing rights (*e.g.*) and be quite normally managed all the while; whereas another form of management might seriously clash with them. With the wide areas usually available in Indian Forests, relief may often be had, by growing special kinds of trees or compartments for lopping, for producing "streu": grazing can often be supplied by leaving unplanted, natural pasture glades ("tách" and the like); or by planting in strips and bands and by other devices.[1] Fuel rights will be cared for by special compartments of undergrowth, or coppice of quickly-growing and useful fuel species. In fact, if a *due provision for rights is made an essential element*

[1] As Colonel Bailey has well remarked, "A reserved (State) forest has not necessarily the object, as is frequently believed, of producing large timber for export or public works, but more often that of supplying the local demands in smaller timber, fuel, grass, or any other forest produce. A forest may be said to fulfil its very best function when it produces in a permanent fashion the greatest possible quantity of the material which is most useful to the general public, and at the same time yields the best possible return to the proprietor." The object of the forest administration is wisely to take account of the *entire economic position*, and not by aiming at one class of production to forget another, which may really (in view of the *total* advantage of the public) be of still greater value.

The temptation to do this is one which besets the Forest Officer, especially under a system in which the financial authority (most naturally) always demands a good cash result, while at the same time an enormous mass of material is annually *given away without the least note of its value, or its being shown in any way in public accounts*. Even in the case of *rights*,—the produce of which is no part of the State income,—it is essential that their value should be known; because the administration has to be conducted with the aim of providing for them, and therefore the value produced ought to be known; not indeed because it represents the direct earnings of a State Department, but as a gauge of the results of work. If Government wishes a large portion of its public forests to be worked expressly to secure a greater enjoyment of private rights, it ought not to think the forest staff a (financial) failure, without taking account of the results it produces,—results which the present system does not admit to the balance sheet.

in the elaboration of schemes of working and management, a very great relief will often be obtained. The importance of studying this aspect of the matter is very great, but the details belong to other departments of forest learning, and I can only here press it on your attention in general terms. By a skilful adjustment of areas, and methods of treatment, it will be possible to make special provision for rights; and thus the forest may come in time to be looked on as a real source of comfort to the people. But it has to be borne in mind, that in no country will an ignorant peasantry ever fully understand the importance of forest conservancy—either as regards the right of the State (or the tax-paying public) to the realizable value of Forest estates, or as regards the climatic and economic benefits of Forests and their produce. They will never regard any control over wasteful and reckless habits, as otherwise than oppressive. Unfortunately, also, it is only too easy for well-meaning speakers and writers (quite unacquainted with either the principles of Forest law or the facts of its administration) to join in an outcry against a Forest Department, doing so in terms which are always vague and indefinite, and are therefore difficult to take hold of or reply to. Forest conservation has always to be carried out in the teeth of opposition of some kind; and not the least difficulty in its way is the inveterate (if unexpressed) belief that "common" forests *do not need* any kind of restriction on their use. The best antidote to such difficulties of a Forest Officer's position, is to study to manage those areas of forest which are directly in contact with the wants of the people, in such a manner as best to supply those wants. In such cases forest management must be based on a thorough appreciation of the *whole* economic situation.

# LECTURE XXII.

## THE DEFINITION, REGULATION, AND BUYING-OUT OF FOREST-EASEMENTS.—(*Concluded.*)

### *Buying-out or Commutation.*

THE Acts differ slightly in their wording as to the circumstances under which the law permits, or directs, the getting rid of rights by "commuting" them for a compensation. They do not notice buying-out by consent and amicable arrangement; but there is nothing in the law to prevent the parties coming to terms for the extinction of a right, at any time and under any circumstances. All the Acts agree in referring only to compulsory buying-out in State (Reserved) Forests; *i.e.*, they lay down certain conditions under which the Forest Settlement Officer can decide to apply the process. When under such conditions, an order is made, the right-holder cannot (subject to his right of appeal) object.

The Acts also regard the commuting or buying-out only as part of the initial proceedings (Lecture XVII.) for constituting the forest; no provision is made (and this is a defect to be remedied at some future time) for any subsequent application of either side to compensate rights. Yet it is obvious that circumstances may alter; and rights which did not appear at the time of constitution to need any adjustment, may afterwards prove an insuperable obstacle to proper working; and the right-holder himself may be anxious to get his right commuted. There ought then to be a power of proceeding before a proper authority.[1]

In the Indian Forest Act, after mentioning the several modes

[1] The Land Acq. Act (X. of 1870) might possibly be held to apply to such a case; but it would probably be considered rather a straining of language. The Act enables Government to make a declaration of public utility in the case of "land", and (by the definition clause) "land" includes "benefits to arise out of land;" so that if it was a public advantage to be free of the easement, it might be said that the forest right (as a benefit to arise, &c.) was required for a public purpose.

(already discussed) of providing for Forest-easements, sec. 15 goes on to say: "**In case the Forest Settlement Officer finds it impossible, having due regard to the maintenance of the (Reserved) Forest to make such settlement under Section 14 as shall ensure the continued exercise of the said rights,**" &c, he *shall* (subject to Rules which may be made on the subject) proceed to commute, *i.e.*, to buy out the rights.

The Burma Act says merely, "If the right is not provided for otherwise," the F. S. O. shall commute it. The meaning, however, is practically just the same, as the right would be "provided for" by admission to exercise, if it were not incompatible with the safety of the forest. The Madras Act adopts the same wording as the Burma Act.

The Indian Act expresses distinctly, the principle that a right can be exercised in the forest under two conditions;—one in favour of the right itself, one in favour of the safe existence of the servient forest. The right must be ensured a *continued exercise* (*i.e.*, not satisfied for a short time, after which it may fail); and the forest must be *duly maintained*, *i.e.*, must not have its resources over-taxed nor the indispensable business-like management of it prevented.

From this clear expression of principle (and no other meaning can be given to the words used) it appears logically to follow that, if the forest is unable, in its natural and existing state, to provide for all the rights allowed, and that *without* fault of the Government in its Forest Department (through over-cutting, defective management, &c), then a reduction of the right must follow; and that in such a case there could be no claim to compensation The deficiency being due to nature—or due to some action in the past, for which the present cannot be called to answer—there seems to me no more ground for compensating a disappointed claimant, than there would be if some natural calamity had caused the whole forest absolutely to disappear.

It is impossible to say how the matter would be settled if a case actually occurred in which a forest was at the time of constitution in a bad state (so that whatever it would ultimately bear when restored, it would not *then* bear the rights), or when a forest became in a bad state, perhaps through an extensive accidental fire, or an attack of insects. Equitably and in conformity with principle I submit, a reduction (*cf.* pp. 293, 305) or a suspension of rights *pro tem.* could

be claimed; and on what *principle* of justice the public treasury could be asked to pay compensation, I am at a loss to conceive.

The Indian Acts however make no provision for the question; and seem to award compensation under all circumstances where the F. S. O. cannot make provision for the rights. It may perhaps be held that the Act is so, reason or no reason: or that it was intended on what I must call eleemosynary considerations; or because the inability of the forest would be due to the absence of public control in the past. There I must leave the subject, and pass on to what is next provided.

The forest will have been carefully studied and inspected before the settlement, so that the F. S. O. will have the best means possible under the circumstances, of judging on the points which the law requires him to take into consideration. If in the end, it appears that the available grazing acreage and the probable yield in wood, will not (without wrongful excess) continue to supply the rights, commutation is the only remedy provided in set terms. It would not, however, be necessary to commute the whole of the rights in many cases; there is nothing, for instance, in the law, which would prevent the F. S. O. arranging with a right-holder who had 50 cows, to take compensation for 25, and continue to graze the other 25.

But ordinarily, it is not only one right that has to be dealt with; there are many right-holders; it is the *aggregate burden of their claims* that may prove excessive; and it would be difficult to lay down any rule under which *some* rights should be entirely bought out and the rest left alone. In some cases at any rate, it would be desired to equalize, by adopting the plan of *proportionate* reduction of the whole: compensating all for the part of the right extinguished, and leaving the rest. Here the principle explained at p. 378, (App. A.) might be applicable. Considering the probable total capacity of the forest in grazing acres, or its yearly yield of wood for fuel or building, the reduced quantity for each R. H. could be calculated out easily enough by the aid of the formula given in the note to p. 378.

If a general proportionate reduction had to be made, there would, I think, be no occasion in India to make any allowance for the owner's right of participation. But generally, where the rights absorb the whole produce, the State as owner, would

certainly have a prior right to reserve such part of the produce as would suffice to meet the cost of the establishment. This right depends on the principle (*mitnutzungs-recht*) explained on pp. 294, 297.

In all cases, it rests with the Forest Settlement Officer (after hearing the parties, and subject to appeal), to determine when the circumstances exist under which the right has to be bought out. He ultimately decides (on the evidence of forest experts, reports, inspections, &c.) that the right would or would not be compatible with the due maintenance of the forest; and that the regulated right could or could not be ensured a continued exercise.

Nothing is said as to the easement being indispensable to the R. H. By this term I do not mean to refer to what is known as an "easement of necessity" (p. 80), which concerns easements such as the right of way, or watercourse. Sect. 24 of the Act settles all such questions; and the procedure under sect. 15 is not concerned with them in any way. But in the case of right of pasture or to produce, it might prove to be the case that a R. H. would be almost unable to find a substitute for his right. In practice, fortunately, the question will very rarely prove beyond the power of the F. S. O. to dispose of equitably; the times were not ripe when the Act was made, to attempt any refined distinctions or provisions on the subject.[1]

[1] In France the plea of "indispensability" may be raised; and if there is a dispute it is settled by the Conseil de Préfecture. Wood-rights are never deemed to be indispensable; as wood can always be bought; but grazing may be (see Code For. Art. 64). (But this would not avail if it were the fact that the forest was not in a condition to support the right). In the Austrian law, commutation may be refused when either the right is absolutely necessary to the R. H., or the cost of compensation to the forest-owner would be excessive.

In principle, therefore, the continental law decides, 'if the right be of a kind that we can recognize as indispensable, and be proved to be so, then, so long as the forest *can* supply it, the right cannot be got rid of: if the forest is unable to support it continuously, and with reference to the safety of the servient property, we cannot help it, that is the fault of nature.' On the general subject, another consideration must be borne in mind: it may be true that in some cases a right is 'indispensable' or is very much wanted, but there are hill ranges and many other places, where, if the grazing right is not reduced to perhaps rather inconvenient limits, or stopped altogether for a time, *nature will stop it for you* by ceasing to produce, on the ill-used soil, the grass necessary for the grazing-right. It is much better to give compensation than to produce this result. Moreover, who is to decide, in a backward or semi-civilized country, whether the right *is* absolutely necessary? In Europe the conditions are different, and it may be possible to discuss and settle such a question by

The means of compensation are specified in general terms as "land" or "a sum of money" or "compensation in such other manner" as is thought fit by the F. S. O., with whom rests the decision as to which form is best to adopt. He may always give compensation partly in one form and partly in another. Only in the Burma Act (sec. 15) is his choice restricted by the proviso that he cannot give land in compensation, unless the right-holder consents to take it. But anywhere, the F. S. O. would never force a man to take land if he preferred money.

These terms would allow of the adoption of any one of the forms used in Germany, which are described in Appendix A. to this Lecture. The practical considerations there stated will also prove worthy of attention.

Observe however in India, that when land is given, it will almost always be culturable land, and there is no reason why it should be a part of the forest; for other Government land in the neighbourhood may be available. In many cases, outlying areas of the forest will already have been set apart for the purpose of providing for rights which are excluded from the reserve (p. 266).[1]

In saying that *culturable* land would be awarded, I should add that as far as the terms of the Act go, there is nothing to prevent the compensation plot being wood- or forest-land, or a plot adapted only to some particular use; but practically such lands would not be acceptable; the party to be compensated would rarely, if ever, be able to utilize a plot of forest as forest; nor does there exist any legal provision compelling him to maintain it as such. Whatever land is given, even if it is a portion of the forest area itself, it will always be cleared for cultivation.

In general it should be observed, that it is well to explain matters freely, and to advise the (probably ignorant) right-holder, and see that he understands his own advantage and the *pros* and *cons* in accepting

evidence and argument before a court of law In India, it is much better to leave the matter to the Settlement Officer (and, the local Government has power *to lay down any rules* it pleases for his guidance in this matter) The Settlement Officer is bound equitably to consider *both* the forest interest and the interest of the people, and decide whether a commutation is or is not desirable

[1] I shall be excused for repeating, that we are here speaking of the grant of land in absolute property as a compensation for a right extinguished, and this has nothing to do with the previous arrangement whereby the right is left in existence, but its exercise is provided for in some tract excluded from the (legally constituted) forest, but which *does not* become the property of the right-holder.

one or other form of compensation. Culturable land is really one of the best forms of compensation: it gives a steady return, and is (under all ordinary circumstances) a secure and substantial property; it may also give a man the means of feeding his own cattle, and providing manure for his own original holding (in connection with which the right existed). On the other hand, there are cases in which money, and especially an annual payment, is more useful.

### *Valuation.*

The Act says nothing about the principles on which either the valuation of the right, or the valuation of the means of compensation, is to be conducted. Things were not ripe in 1878, for such provisions; the basis of practical experience was wanting. But as time goes on, Rules can be made under the Act, which will provide all that is necessary. Here again the details given in Appendix A. as to valuation in Germany, will often prove suggestive. The rules of the French law (as described in the Code and the "Ordonnance") will also prove useful, whether relating to the compensation by land (*cantonnement*) for wood-rights, or by money (*per voie de rachat*) for other rights.[1]

Under any circumstances it is necessary for valuation purposes to start with a unit of value; and obviously that is the sum of money representing fairly *the value of one year's exercise of the right;* or if it is a right exerciseable once in 5, or once in 10, or once in 30 years, &c. (as for repairs and total rebuilding) then an average can be taken.

In India this can only be a roughly calculated and liberal sum—liberal, I add, partly because the transaction is compulsory, and partly to obviate inequalities resulting from a possible rise and fall in prices. General conditions can be taken into consideration, *e.g.*, grazing for a cow in good forest-grazing, would be valued higher than that in a poor dry scrub-jungle, where grass only grew during a short "rainy" season. A rough acreage of the area requisite to supply the right could be estimated, and a fair value per acre assigned; or calculating

[1] The grant of a bit of the forest cut off (*cantonnement*)—it is *always* a bit so cut off—is applied to wood-rights, because the R. H. *can* if he pleases, keep the place as forest to supply his rights in kind; but otherwise he is *free* to do what he chooses; the land is valued *as it is*, and handed over to him: "*le cantonnement compense en pleine propriété ce qu'il ôte en droits d'usage*" (*Meaume*, sec. 162, p. 223).

the probable value[1] of feeding one animal (see p. 353), and multiplying the figure by the number of animals grazing in a year, an approximate value of the annual grazing right would be obtained. In all cases the first step is to obtain *the sum of money that represents one year's average exercise.*

The next step is to *capitalize* this unit value. To do this scientifically, would involve the consideration of what is the proper rate of interest which a valuable easement, regarded as a kind of property or investment, may be taken normally to produce; just as we know by experience what rate of interest can usually be got from house property, from investment in public funds, from agricultural land, &c., &c., on a general average. That being known, it is a matter of arithmetic to calculate the capital value, or, in other words, to say "how many years' purchase" (of the annual value) should be fixed.[2] For a long time to come, in India, it must suffice to lay this down more or less arbitrarily; (we might assume (for example) that the R. H. ought to get as the rate of interest on the capital value of his right about the same as culturable land would give him; this would be sufficiently liberal). In that case, something between 15 and 20 years' purchase (according to the quality of the grazing and the practical value of the right—greater or less, to the R. H.) might be adopted.

Given the capital value of the right, we have lastly to determine a certain compensation, the value of which will be a just (and fairly liberal) equivalent. If it is land, it will be best (in order to simplify calculation) to value it as if cleared and ready for the plough. If costs will be incurred in clearing, they may be provided for by giving a lump sum of money to cover all initial expenses of starting cultivation. The land will also in future, be liable to land revenue and cesses. It may be that the Controlling Revenue authorities will consent to remit these (in revenue language the

[1] This value might be calculated by ascertaining the cost of stall-feeding, and taking a rate per head more or less approaching the cost, according as the grazing (which is being valued) is better or poorer (see p. 383).

[2] The *formula* is $C = \frac{R \times 100}{p}$; where C is the required capital value; R is the annual value, and $p$ the given rate of interest. Let us suppose a grazing right whose annual value is *Res.* 24; and we take 5 p. c. as a proper rate of interest: then $C = \frac{24 \times 100}{.5} = 480$ (*Res.*) or, in other words, we take 20 years' purchase of the annual value to give the capital value (see p. 383).

grant will be *muáfi*), if not, then the capitalized revenue charge (at the same number of years' purchase) must be deducted from the total value of the land; and this will result in so much larger an extent (in area) or some superior quality of land, being requisite.

In valuing land, we can have recourse to comparison with the (possibly ascertainable) value of similar land in the neighbourhood. But most commonly it will be necessary to calculate a fair money value per acre for the crops (of ordinary kind) that can suitably, and will according to custom, be grown (deducting the costs of production, and the land revenue and cesses if these are not remitted). This is the value per acre according to yearly average return; and the total or capital value of the land per acre is found by multiplying this produce value by a certain number of years' purchase, which may be from 15 to 20 (land rarely sells for more).[1]

If this sort of calculation is not practicable, then I submit that we must waive all questions of logical accuracy or real equivalence, and adopt such a general rule as is contemplated by the law of Saxony which lays down[2] that "the plot of land given in compensation must be in extent and capability, such that the grantee can get off it (an annual) yield (of whatever kind of crop) *equal in value to the calculated annual value of the right*" which is being compensated; (*i.e.*, if the right yields what is represented by a money value of 10 Rupees a year, the land must also bear crops giving a net yield of Res. 10.) No doubt, in theory, this is not an accurate rule;[3] but then accuracy is, under existing circumstances (and will be for many years to come), unattainable in India and the Colonies. In all cases, a good deal will depend on locality, on land being generally more or less prolific, and more or less desirable and in demand, as property.

If a "sum of money" is given, it will obviously be that sum which represents the capitalized value of the right, the calculation of which has already been explained.

[1] If the produce valuation per acre is known, we can at once tell how many acres will be needed to give a capital value equal to the capital value of the right. A grazing right at 20 *Res.* annual value is capitalized (say × 20) at *Res* 400. Land available has a roughly estimated *net* produce value of *Res* 10 per acre. Capitalized (at say × 15) it is *Res* 150. Something under 3 acres would then be the compensation.

[2] Law of March 17th, 1832, Art. 130. *See* Qvenzel, p. 216 ff.

[3] See remarks in Appendix A. (p. 384).

I would, however, point out, that a payment of a lump sum of money down, to an Indian peasant right-holder, is about the worst way of compensating him that is possible. He will have no idea of investing the money, but will spend it all in a very short time, or the money-lender will absorb it. I do not discuss the possibility of giving a sum in Government securities or deposited in the Savings Bank; but it can certainly be urged that an annual payment, or other sum to be drawn periodically from the Treasury (of the Tahsíl or Revenue Subdivision) is far more useful and lasting. It is clear that from the mention of a "sum of money" and also of "other means" and the wide discretion given to the F. S. O., that there could be no legal objection to making a periodical payment.

Under this head it might be possible to compensate in money by means of a *remission of the land revenue* payable on the person's own agricultural holding. This would be in fact, making a money payment, but securing its being advantageously expended. No such arrangement could be made without the previous sanction of the Chief Revenue Authority. It may also be possible in some cases to arrange some *delivery in kind*, as a certain quantity of sawn wood, or a delivery of manure (in kind) in lieu of a litter-right; but such matters can only just be mentioned as quite within the terms of the law.

Whatever form is adopted, the object ought to be to give realizable value, *i.e.*, something which practically suits the condition of the recipient, and is really a compensation to him for the right he gives up.

# APPENDIX A.

## An Abstract of the German Law regarding Regulation (which includes Definition), and Extinction by Compensation (Ablösung) of Forest Rights.

### (I.) *Regulation.*

Regulation is, in Germany, considered as including definition; in other words definition is one of the processes of regulation. We have (*a*) General regulation; (*b*) Special regulation.

(*a*) "General regulation" means that the exercise of rights is, in all cases and without any special request on the part of either side,[1] subject to certain general rules provided by law. Such general provisions affect:—

(1) The *Time* at which rights may be exercised, *e.g.*, prohibiting removal of produce during the night or after sunset; confining the exercise to certain days of the week, and to days that are not recognized holidays, so that proper officers may be on the spot to watch proceedings; restricting exercise to certain seasons of the year (*e.g.*, rights of litter (*Streunutzung*) which are only allowed during the months when the leaf-fall is most abundant, and therefore the litter can be obtained with the least injury to the forest-soil).

(2) *Place* of exercise: *e.g.*, establishing certain closed places where young growth, etc., is in progress (*Schonungsflächen*).

(3) *Mode* of exercise: *e.g.*, giving a right to the forest-owner to have *due notice* when certain produce is going to be taken, that he may be able to supervise its removal: prohibiting the use of dangerous tools, as sharp iron rakes in collecting litter (which tear the soil and destroy seedlings), cutting tools or irons in collecting dead wood (owing to the temptation they imply of *cutting* wood that is not dead). It is under this head that they regulate the kinds of cattle that may be admitted to pasture: *e.g.*, prohibiting *goats* as highly dangerous to the forest.

[1] It is, perhaps, hardly necessary to explain that whenever "either side" is spoken of, it means the forest-easement-holder on the one side and the State (or other forest-owner) on the other.

(*b*) "Special regulation" applies to particular acts or restrictions requisite in individual cases, and which can be legally ordered when a formal application is made to enforce such regulation. In some cases it is compulsory; that is to say, either side may demand some special action or abstinence, and the other side cannot object except as to details. If they cannot agree on what is to be done under the circumstances which give rise to the application, the proper officials (of whom we shall speak presently) are to decide. In other cases, regulation under this head, cannot be had unless both parties agree, or come to terms about it.[1] This kind of regulation consists in making certain arrangements about—

(*a*) The object of the right;

(*b*) The area or site of exercise;

(*c*) The quantity or mass.

As to (*a*): there may be a demand for the *exchange* (*Umwandlung*) of one kind of produce for another. The right may be, in its nature, defined to a certain kind of material; but it can be *equally conveniently* satisfied by the holder taking something else, or something in another way which latter is more convenient (or less injurious) to the forest; then the exchange may be ordered.[2] *E.g.*, the right is to one kind of wood: but another will do *equally well*, and it is far easier for the forest to supply the latter: as where the demand is for firewood, and wood of the kind A will do equally well as B, which the forest-owner does not wish to cut. Here the change will be made by compulsory order, on the demand of the forest-owner, if he can establish the equality spoken of.

Under this head comes the setting free (*Freilegung*) of one part of the forest, when the rest is sufficient for the right-holder. This is done by official order (unless the parties agree). Sometimes it is arranged without any payment, as it inflicts no kind of loss on the right-holder; sometimes it is done by aid of a part compensation (*Theilablösung*).

Regulation of the quantity, number, mass, &c., to which the right extends, is effected either by (1) the definition (*Fixation*) of the right, or by (2) reduction (*Einschränkung*).

[1] *E.g.* a right-holder might object to something that the owner wanted, but would agree if the owner would, on his part, consent to indemnify the right-holder for certain expenses which the latter thinks he would be subjected to in carrying out the owner's requirements, or would make some other allowance.

[2] This is well expressed in principle in the A. L. R. Theil I. Tit. 19, sec. 20. "*Kann das Recht mit gleicher Wirkung fur den Berechtigten auf mehr als eine Art ausgeübt werden, so ist allemal diejenige zu wahlen, welche dem eigenthümer am wenigsten lästig oder nachtheilig ist*" (*cfr.* p. 292).

(1) Definition (also called *Feststellung*) is needed in the case of rights originating in prescription, which has not defined the number of cattle, bulk of firewood, quantity of building wood, &c. A great number of rights in Germany (unlike India) are "*bestimmte*," or defined in their nature and extent, by the terms of their grant or charter. But prescriptive rights (and even some charter rights) are undefined.

Definition is either "perfect" or "imperfect." The former term is applied to firewood-rights, to pasture-rights and litter-rights (*streu*) in which it is possible to determine clearly, the *kind* of firewood, the *form* (brushwood, billets, &c.), the *unit of measure* and the *yearly quantity;* or the *kind* and *number* of cattle and the *season* of grazing; the weight or number of cartloads or baskets of litter of each kind.

Imperfect definition applies to rights which in their nature do not admit of a fixed uniform annual demand: such are rights to building-wood, which vary according as the house or shed requires total reconstruction or only repair; and the exercise of the right consequently depends on an estimate of actual requirements for the particular occasion, as to size, kind, and form. Here it is only possible to lay down certain features and conditions and limits of the right.

(2) "Reduction" applies equally to fixed, and to undefined, rights; but is demandable only in the case of *inability* of the servient forest (*Wald-unzulänglichkeit*): that is to say, where the state of the forest is such that all the rights (including the owner's right of participation) cannot be satisfied. It is, in fact, a rule on the principle of the well known Art. 65 of the French Forest Code which allows of rights being always reduced "*suivant l'état et la possibilité des forêts.*"

This reduction can be demanded, under the German law, in the case of inability of the forest, provided the failure has not been brought about by excessive working or bad management on the part of the owner (in which case he would have the reduction *on paying compensation*). It is also a condition (in the case of reduction of wood-rights) that the forest-owner must abstain from all sales of wood out of the forest during the period the inability lasts.

The reduction has to be effected by a proceeding in Court or with the aid of arbitration.[1]

[1] See Danckelmann, Vol. I. p. 78: there are some special details and exceptions which do not affect the general principle stated. It will be asked *how* the desired reduction is calculated. The *formula* of calculation is :—$x = b \times \frac{We}{B}$: where

Under the head of *regulation*, comes also a quite special procedure (in certain cases) for combining the right-holders into a sort of syndicate or group, regulating their interests for the common advantage. I do not think it would be useful to go into this subject.

### (II.) *Compensation or buying out.*

The process of getting rid of burdensome rights by compensation (*Ablösung*) demands :—(1) determining the quantity or amount, as well as the money value, of the produce derivable annually from the right, and this money value (of one year's actual or average yield) may have to be capitalized ; (2) determining the form, as well as the extent and value of the compensation.

But it has to be further considered that the process of buying out may be (*a*) by consent or (*b*) compulsory. It may also be partial, *i.e.*, may affect some of the right-holders, or a part of the right (on a part of the servient estate) or the whole.

The law looks at the rights with regard to their relative importance, and accordingly enacts what rights can be *compulsorily* bought out, and what only on consent of both sides. The provincial laws differ in this respect ; each basing its own provisions on a review of the local circumstances and public policy.

Under compulsory buying out, come certain cases where the State will undertake it (*Amtsablösung*) without the demand of either

is the full demand of the individual right-holder according to his "actual need," or his defined title : *We* is the total possible yield (for the kind of rights in question) of the forest. B is the total demand of all right-holders (of the kind in question) added together : $x$ is the reduced quantity, number, &c. which can be supplied in each case. Suppose a firewood right. A right-holder has, let us say, according to his full title or actual need, a demand (for the year) of 135 cubic feet of beechwood billets. Another has 200, a third 145, a fourth 150. Then *b* will be (in each case respectively) 135, 200, 145, 150 : B will be $135+200+145+150 = 630$ (cub. ft.). Suppose then that the state of the forest is such that, by calculation of experts, it *can* only yield a total of 490 cubic ft. of beechwood suitable to these rights : accordingly, *We* = 490 c. ft. Then by the formula (in the case of the first right-holder) $x = 135 \times \frac{490}{630} = 105$ : that is to say the (reduced) right-holder must be content with 105 cub. ft. instead of his full 135 ; and so on in the case of each of the others.

Or apply the same principle to a grazing right. The first right-holder has a (full) right to graze 25 cows. Let us suppose that according to the tables, or opinion of experts, &c., these cows require 75 acres (in the particular forest concerned) for their adequate pasture. Suppose further that (B) the total of rights amounts to 375 cows requiring 1125 acres : and lastly that owing to a fire or some other cause, the forest has only 675 acres available for grazing. Here the reduced right of the first holder (with 25 cows) will be :—$x = 75 \times \frac{675}{1125} = 45$ (acres). Then the right-holder can only send in 15 cows to 45 acres ; and so on with each of the others.

party.[1] For our purposes it is enough to regard compulsory buying out under the ordinary conditions of forest property. It is applicable where the law allows either side to submit a formal demand for it. Provincial laws differ as to the question when one side, or the other, or either of them, can inititate the demand (*provokation*). Some rights can only be bought out if the owner demands it; others only if the right-holder initiates the demand; others if either side makes the request. The formal treatises therefore proceed to consider:—

(i.) What rights can be compulsorily bought out?
(ii.) Who has the right to made the demand (*provokations-recht*)?
(iii.) The mode of valuation (*Werthermittelung*).
(iv.) Form of compensation (*Abfindungsmittel*).
(v.) The Courts and officials entitled to act.
(vi.) The procedure.

There are a great variety of provincial and general laws, ordinances, &c.: they are enumerated in *Danckelmann*, Vol. I., and the abstract of them fills from p. 87 to p. 117.

I can only notice the *generally applied principles*. Obviously where there is a consensus of adoption, the principles will be all the more worthy of our consideration as practical and reasonable in themselves.

It is assumed throughout the remarks which follow, that we are dealing with *contested* cases. Where both parties agree, there is of course no question.

### (i.) *What rights can be got rid of compulsorily?*

In theory the law has to consider and hold the balance between the total advantages to the public welfare arising from the exercise of the rights, and the total disadvantage (or in other words, the total advantage which would result from their cessation). There may be cases where the value of the forest and its direct or indirect utility (or both) are so overwhelming, that the importance of grazing and woodcutting rights is small in comparison. But, in other cases, the agricultural and social conditions may be such, that grazing and other rights are well-nigh indispensable, or are of great importance compared with the benefit obtainable by the more perfect cultivation and development of the forests which would be possible if rights were removed. The law may therefore (either absolutely or conditionally) refuse to allow rights to be got rid of, or may (absolutely or conditionally) require or permit it.

[1] This is quite exceptional, and applies only to particular cases in which proceedings are taken for *consolidating* scattered holdings by way of remedy for an evil which the old historical conditions of landholding brought about.

For example: some rights cannot be got rid of, they are of absolute necessity; the dominant estate could not exist or be made use of without them; (*e.g.*, sometimes a right to water cattle at the only water source in the neighbourhood, is absolutely indispensable). Or again, the right may offer no kind of obstacle to the proper utilization of the servient estate; and here the expropriation may be disallowed except in some special case of partition, &c. Grazing rights and other produce rights can hardly be pronounced to be indispensable;[1] but they may be of very great importance, and so their expropriation may only be conditionally allowed.

Let us turn to the cases where, for one reason or another, the law has recognized (either absolutely or conditionally) that the buying out should be enforced if asked for. The first question is, Who is the person entitled to ask that the right should be dealt with?

### (ii.) *Who has the right to demand?*

The Prussian law allows the demand (*Provokation*) to come (in all cases equally) from either side;[2] *but* according as it proceeds from one or the other, there may be a right to the *other* side to choose the form of compensation.[3] In Prussia, if the right-holder demands that his right be bought out, then the forest-owner has the choice whether the compensation shall be based (*a*) on the value of the yield of the right to the right-holder, or (*b*) on the value of the profit or advantage which the owner will derive from being free of the right. (In the latter case, if on inquiry it turns out that the owner's advantage will be practically *nil*, it will not follow that he will get free of the right on paying nothing or a nominal sum; but he must then give up his attempt to get rid of the right, or at any rate offer to pay the right-holder on the other principle.)

### (iii.) *The mode of valuation of rights.*

Valuation (of a right)—in its whole extent and meaning—includes the ascertainment (1) of the exact amount of the produce of the right from its normal exercise yearly or periodically (as its nature may be) at the time of the proceeding; (2) the annual or periodical value of this yield; (3) this total value when capitalized into one sum.

The right is spoken of as the "*soll-haben*" *i.e.*, what the R. H. is

[1] It being never theoretically or absolutely *impossible* to feed cattle in stall, or to buy wood, or manure.

[2] Some other laws define which side can begin, in the several kinds of right.

[3] The right of choice is sometimes made available only in the case of certain kinds of rights.

entitled to (*soll*) (as determined by the terms of his right or as the result of its definition by legal proceeding), and what he can have (*haben*) with reference to the capacity of the forest yield; and the books speak of the yearly produce as the "*sollhaben-Rente*" and the capitalized value as the "*sollhaben-Kapital.*"[1]

Bearing in mind the two bases of calculation last spoken of (R. H.'s profit, and owner's profit), the books proceed to discuss the valuation of rights of each kind, first on the one principle, then on the other.

The net value required, is in theory the future value, because the R. H. is to be compensated for what he will lose in the future; nevertheless in practice, the past exercise of the right is looked to, as often affording a useful standard of what the normal exercise is, and would be if continued. Questions of price and costs of production often cannot be ascertained in any other way.

(1) The first step is to fix the amount of a year's material or produce, for which a money value has to be found. There are some rights which are not, however, exercised always and uniformly year by year; but (as in the case of building-wood rights) only from time to time at regular or irregular intervals, and then with varying quantities; but the supply can be reduced to *the form of a yearly average*, if need be. And as the amount of produce normally received depends on the condition of the forest as well as on the R. H.'s title, therefore the amount has to be differently determined under the conditions (1) of the servient forest being able to satisfy the right in full, (2) of its not being able.

Where the quantity depends not on the terms of a grant, &c., but on the "actual requirement" of the dominant estate (or personal R. H.), reference is made both to the terms, the actual need, and the *average past* receipts. When the actual need is considered, a question often arises as to the R. H. having some *other* resource besides the servient forest, in which case the *whole* need cannot be treated as burdening the forest-owner, and as requiring compensation from him.[2]

If the forest is incapable (without fault of the owner) then the *reduced* right (p. 378) is what is considered. But as the forest is, under proper measures, recovering more and more, up to the condition when it will again support the full right, the right may have to be calculated as gradually increasing (up to its full figure) for a whole "forest period," or an average taken.

(2) The annual (or other) average total quantity of produce has now

[1] The capital (C) is always the sum total which will, at a given rate of interest ($p$) produce a sum (or income) equal to the yearly value (R). So that $C = \frac{R \times 100}{p}$.

[2] This is explained in a note at p. 292 (Relation of R. H. to forest-owner).

to be represented in money. There is sometimes a known market or selling-price for the material. An average of the prices for 5 years or more (according to convenience) is taken; but prices of years of war or famine are excluded as abnormal. In the case of wood, prices for 5 years are often sufficient, as such prices vary slowly; if it were grain, the prices for 10 years would be better, because of the (usually) greater fluctuation. When the material is such as is not a marketable thing, then resort is had to comparing the known value of other articles of a similar kind; or to a calculation of the value of the right by a comparison with what other means of supplying it would cost. (For example in valuing the grazing of a cow for one year, we might find out what it would cost to buy cut-grass, or what the cost of stall-feeding would be, which is saved when the animal grazes in the forest.[1])

Multiplying the total quantity for one year as calculated out, by the unit price or value determined on as reasonable, we have the yearly value. And from this any (annual) costs of procuring the material or working the right, which fall on the R. H., will be deducted: (such are the cost of keeping the necessary herdsmen, the expense of cattle bells, cost of labour and transport, in getting home wood, &c., all of which fall on the R. H. and naturally diminish the value of the right).[2]

(3) The net yearly value can be capitalized, by considering the capital sum or value which (at a rate of interest to be determined on) will yield an income *per annum* equal to the net yearly value of the right. The important point here is to determine *what rate of interest* shall be selected. In some laws, the knot is cut by a simple direction of law to adopt a specified rate; or a certain number of years' purchase—(often 20 years) is selected.[3] I need hardly explain that to speak of "20 years' purchase" is only a short and practical way of saying, that the value of the right is such a sum as will, at compound interest at 5 p. c., yield a money income equal to the calculated annual value of the right. So "25 years' purchase" means the same at 4 p. c. interest. The whole discussion as to the most correct rate of interest

[1] Or with a right to dead and fallen wood (for fuel) we might find out the normal price of 100 cubic feet (or other unit) of regular firewood, and calculate that the dead wood, being inferior, was worth ½ or ⅓ of the value of solid billets or split wood.

[2] Sometimes there are special terms of set-off, as where the cattle grazier gains for his farm, the manure which would otherwise be lost to him by being dropped in the forest when the cattle went there to graze. This might have an appreciable value.

[3] This rule is criticised on the ground that it supposes the *price* of the article produced by the right, to remain constant. If it were building wood, this would tend to rise. But as a matter of fact in selecting the price to be used in calculating, a fair average price is made use of, which in itself obviates practically, any prospective loss.

to be made use of, I must pass over. Those curious on the subject, can consult Dr. Danckelmann (on the general principle, in Vol. I. pp. 149–157; and with special reference to calculating value of periodically exercised building-wood rights and with reference to altering values of wood, in Vol. II. (head *Bau-holz*). I may mention, however, that the reasoning is based on the consideration that average or usual rates of interest vary with the different subjects dealt with, and the kind of security. We speak of a general average rate obtainable from money invested in the public funds, another as obtainable from house property, another from agricultural land (meaning that the average normal results of farming operations represent a certain per-centage return on capital value). Forest property has its own average money yield regarded as a per-centage on the capital value of the estate and its growing stock. High forest represents a large capital and small interest. Coppice, with a shorter rotation, represents a smaller capital and larger interest. In Germany especially these differences are important, in considering the form of compensation: because it may (as we shall see) take the form of land, or of a yearly payment, or of a capital sum of money.[1]

But I must hasten to notice briefly the other basis of valuation (p. 381), viz., the profit which will accrue to the owner from the extinction of the right. If it is the right-holder who demands to be bought out, it is held only fair for the owner to be able to say: "I do not wish to get rid of your right, but if you desire it, then I can only give you the value of the benefit that will accrue to me; if not satisfied with that, keep your right in exercise and forego asking for compensation." I have already noticed the general rule that if, this method having been chosen by the owner, the profit to him turns out to be *nil*, he will *not* get the right bought out for nothing, but will have to give up its commutation. And I have further to add, that in no case will the right-holder be allowed a sum in excess of the value of his right, even though (conceivably) the profit to the owner, by getting rid of the right, should exceed the value.[2]

The profit to the owner may be either direct or indirect. It is

[1] In India for a long time to come, it would be impossible to go into niceties of this sort—much as they may affect money calculations on the large scale. We can only calculate a fair value of any right, and must adopt so liberal a standard as would suffice to discount, so to speak, various objections as to possible rise and fall in future prices, and the like. And we should always have to be content with a certain "number of years' purchase" to be fixed by rule; either one for all classes of rights, or one or two differential rates for broad classes of rights.

[2] For obviously if such excess appeared, it would only show that the forest-owner was justified in asking to be relieved of the right; it would not entitle the right-holder to be over ompensated.

*direct* when (*e.g.*) the building timber to which the right-holder would otherwise be entitled, remains with the forest-owner, so that he can sell it himself and pocket the proceeds. It is *indirect*, when, owing to the cessation of the disturbance, risk, injury to soil, and other obstacles involved in the working of rights, the forest improves in character, and is perhaps more cheaply managed (not so much fencing, or so many guards required, &c.). Release from a litter-right (*e.g.*) could only be of this character. The forest-owner would not, of course, sell the humus and dead leaves nor scratch them off the ground for his own farm, so he would derive no direct profit; but his soil would remain covered, his seedlings would not be exterminated, and after a certain term of years the improvement in the general state, and even appearance, of the forest would be noticeable; blank spaces would close up, and in the end, the timber production would be considerably increased. It is a question of the facts and circumstances of the case whether there is a direct or indirect profit,[1] or indeed any appreciable profit at all.

In a case of direct profit, the produce of the right will usually have a distinct value, which can be calculated out for the year. and then capitalized. In the case of indirect profit there are difficult questions of calculation which I do not think it useful to enter upon. If necessary, reference may be made to *Danckelmann* (Vol. I. p. 164 ff.).[2]

### (iv.) *Form and mode of compensation.*

The principle on which the choice of means depends, is, that whatever the means in themselves may be, they must represent (under the circumstances of each case) a practical, realizable, value which is a fair equivalent for the right extinguished; or (referring to the distinction above made) it must produce an equivalent to the loss of the right to the dominant estate, or to the benefit to the servient

[1] For example, in a normal forest with a fixed right to wood of a certain kind to be delivered: there is no indirect profit from getting rid of the right, only a direct profit to the extent of the value of the wood which the owner of the forest could now sell. In other cases (as that in the text) there is only an indirect benefit: in others, something of each.

[2] It may be stated generally, that the method of taking the benefit to the owner, as the basis of calculation, can only be applied in a few cases, where the right is but slightly injurious (*e.g.* grazing in high forest with but few cattle and plenty of space) and yet *the right is not of great value*: where in fact the *indirect* benefit exceeds the *direct*, but is less than the value of the right to the R. H. Where the right is very injurious (*e.g.* a litter-right of the kind which involves raking up humus) the method though possible, is of no use, because the *direct* profit to the owner is *nil* (he would not sell the humus), and the *indirect* benefit to the owner is so great that it exceeds the value of the right to the R. H.; and in that case only the latter amount can be claimable. Where the right is but slightly injurious but in itself very valuable, the method is also inapplicable, because the *indirect* profit to owner from its extinction, is almost *nil*, and the *direct* profit, though considerable, is exactly the same as the value to the R. H.

estate, consequent on the extinction, according as one or other of these two bases of calculation is selected.

The *kind* of compensation selected, must be adapted to the "working circumstances" and character of the estate (or person) to be compensated. It would be of no use (*e.g.*) to offer a cottager who has to give up a grazing right, a plot of timber-forest which he could not utilize unless he could sell it outright—you must not, in fact, "offer him a white elephant." Nor under any ordinary circumstances, could the form be such, that it could be valuable and useful only on condition of entire change in the R. H.'s hitherto usual means and mode of living, or managing the dominant farm or other estate.[1] Indeed this is involved in the first requirement that the value of the compensation should be practically realizable. If a piece of land is given, it must be of such a kind that the particular person taking it can utilize it and be able to derive the value contemplated.[2]

When *land* is given, part of the forest is cut off for the purpose; therefore it is one of the conditions of selecting this form, that the *remaining* forest is of sufficient extent to be properly managed. And generally whatever form is adopted, it must be one which, under the circumstances of the case, tends to maintain general well-being and progress, and will not compel or invite a lowering of the style of living or the standard of agricultural working.

Compensation takes the form either of a capital sum, or a yearly payment (*rent*):—

| | |
|---|---|
| I. Capital. | 1. A plot of agricultural land, or land to be cleared and brought under the plough.<br>2. A plot of forest—to be kept as such.<br>3. A plot of land adapted only to some special purpose (turf, growing reeds, &c.).<br>4. A sum of money in the lump. |
| II. Rent (annual or periodic). | In kind:—yearly delivery of corn, wood, &c.<br>In cash:—yearly payment of money. |

On these forms in general, it is to be observed that in the case of private owners, compensating by a yearly payment in kind or in money, is not exactly a freeing of the (servient) estate: the right ceases in its original form indeed, but the yearly payment becomes a substituted charge on the estate.

There are various laws which fix, to some extent, what *form* of

[1] "*Welche eine Veranderung der ganzen bisherigen Art des Wirthschaftsbetriebes des Hauptguts nothig macht.*"

[2] *E.g.* a piece of land might be adapted to give valuable produce with the aid of skill and a large capital expenditure in plant and tools. This would be useless to a peasant R. H. who could only bring to the working the usual ploughs, cattle, family labour, petty capital and resources, ordinarily possessed by men of his class.

compensation is to be given, or in what cases, and under what circumstances this or that form is to be selected.[1]

(I.) *Capital Compensation.*

The books discuss the general advantages of the *Landabfindung*: it may enable the R. H. to produce for himself, what he has hitherto had to get (under restrictions perhaps, more or less unpalatable to him) from another estate. It may tend to the more equal diffusion of the advantages of land-ownership, and make the compensated R. H. more independent, and more settled for life.[2]

The land, if available, is contemplated (which would not always be the case in India) as a part of the servient estate, given up altogether, in full proprietary right for the purpose of compensation. It must therefore be itself unburdened with rights. The land may be of the several kinds already mentioned. Practically land for agriculture is mostly in demand. And it is likely that there will be some expense and labour requisite to clear and prepare the land (and there may be a land-tax to be paid or other charges, *e.g.* costs of making or keeping in repair, drains, fences, roadways, &c.). These are all so many reductions in the practical value of the land. For facility of calculation, therefore, the land is usually calculated as if free from such charges; and then a separate money allowance is handed over to the person taking the land, sufficient to cover all these items.

(1) If it is proposed to cut off a certain plot of land and give it up as compensation, it is a first question whether it is economically advisable to clear this bit for cultivation or not. For it may be that the land is valuable as forest but will give a poor return to the plough; in that case the bit will not serve, unless indeed it is intended that the bit cut off shall be kept and managed *as forest.*[3]

I pass over the detail of what is to be done if the land destined for agriculture, has on it a stock of young growth (poles, &c.) or perhaps of mature timber—which will have to be cleared off. The clearing of young growth will represent a loss—as most probably circumstances will not allow the claimant to wait all the years while the young stock is reaching maturity. On the other hand, if the proprietor

[1] See Danckelmann, Vol. I. p. 178. Sometimes a right of choice exists, according to which party it is that has started the claim to commutation (p. 38). If the R. H. has claimed, the owner may have the choice of means—whether he will give land or money: if the owner demanded, then the R. H. chooses. It is found in Germany that the forest-owner generally prefers to give money, and the R. H. prefers to get land.

[2] Danckelmann, Vol. I. pp. 175-7.

[3] We shall see presently in what cases alone *forest* land is suitable as compensation. In the great majority of cases, where *land* is the form selected, it is *culturable* land that the person compensated will require.

has to clear off mature wood, he cannot do it in a moment;—a delay of from 3 to 5 years is usually arranged, and during that time the owner pays a rent to the expectant transferee for the use of the land.[1]

To ascertain all these matters, it is necessary to have plans of the estate, and to draw up proposals for locating the lands to be utilized for compensation; to determine what each plot is best suited for; to determine the value of the plots. It is here necessary to consult and employ experts; and the books contain many details, which it would not be useful to reproduce. But I may remark that *land* can be valued either with reference to a known market-price per area-unit for land of the same kind, extent, situation, and advantages; or it may be valued according to its annual net-yield (after deducting costs of production).[2] Counter charges for land-tax, &c. are not included (as I have said) in the valuation, they are separately accounted for, and allowed in money. The "market value" is not however often applicable, because it is so difficult to find exactly similar cases for comparison. It is therefore most usual to judge by the yield-standard (*Ertragswerth*). When this is calculated, and a value obtained per *hectare* (or other area-unit), the capital value is determined with reference to a proper standard of interest-rate, or to a usual number of years' purchase, applied in land valuation. Such an area of land is then awarded, as that its capital-value is equal to the capital-value of the right (as calculated on its own proper basis) or,

$$\text{Area} = \frac{\text{Capital value of right}}{\text{Capital value of land-unit}}$$

Dr. Danckelmann (I. 187) remarks on the "widely prevalent error" of supposing that the plot of land to be given, is always a plot whose annual yield-value is arithmetically equal to the annual yield-value of the right (*e.g.*, as if a grazing right for 30 cows—the value being 600 *marks* a year, at 20*m.* per cow—were necessarily to be compensated by a plot of land of 20 *hectares*, whose yield at 30*m.* per *hectare*, is also 600 *marks*). He argues that equal yearly incomes (or produce-yields valued in money) do not always imply equality of value in the capital. It depends on the *rate of interest* applied, and that again depends on the greater riskiness, or stability, and the general

[1] Where there is a stock of young (*unreife*) trees, the claimant must either give up the attempt to get the land, or submit to a charge for the loss occasioned to the forest-owner—occasioned, *i.e.*, by the premature cutting, which will be greater or less according as the growth has *some* market value in its present state—more or less: Dr. Danckelmann has some rather elaborate considerations about this allowance (*verlust rente*), see Vol. I. p. 207–8.

[2] *I.e.* the annual value will = total produce of the year in kind × the price per bushel (or other unit of produce) *minus* the costs of production.

desirability of the form of capital. A right of user in a forest (regarded as a kind of property in itself) is never so desirable or so stable, as a freehold right of ownership in land; and the valuation of either *per se*, is conducted on different principles.[1] You have therefore to calculate separately (each on the considerations special and proper to it) the capital value of the right, and the capital value of the land, and compensate one capital by the other.

By way of example I may take the following case—the values are of course purely arbitrary, but will serve to show my meaning:—

Suppose a right X. has an uniform annual or average yield valued at £15, and that the Forest law, or the general equity of the case, determines that this sort of right is to be *capitalized* by taking 20 years' purchase of the annual yield: that is the same thing as applying a standard of 5 p. c. compound interest. Then the capital value is $15 \times 20 = £300$ (or $£15 \times \frac{100}{5 \text{ p. c.}} = £300$). Next suppose a plot of plough-land having a net annual yield in produce valued at £15 per acre. According to the erroneous method alluded to, one acre would be given as compensation, because either land or right would yield £15 annually. But if we proceed to value this land according to the usual standards of capital value applicable to agricultural land as a class of property, we should find (let us say) that such land usually sells at no more than 15 years' purchase of its annual rental or net yield. The capital value of one acre would then be £225, and *one acre* would, in capital value, *not* be the equivalent of the capital value of the right (£300). It would be necessary to give $1\frac{1}{3}$ acres of such land as a just compensation. If again plough-land (of the kind) were so desirable that habitually it was valued at 30 years' purchase, the capital value per acre would be £450, and nearly $\frac{11}{16}$ of an acre would be the sufficient compensation.

(2) One of the forms of land-compensation recognized, is to give a plot of land,—part of the forest, *to be kept and used as forest*. This form of compensation is however only useful in exceptional cases. If, for example, a plot of high forest were given over to a peasant right-holder as compensation for his right, he would necessarily desire at once to cut down the trees and convert them into money: so that, economically speaking, we should be giving him a money compensation

[1] As to the greater (general) value of a freehold in land, it is obvious that the holder of a right of user, cannot, do what he will, by skill, exertion or economy, much increase the value of the right: but the free owner of acres can, by greater skill, care and attention, continually improve his property and raise its annual value, and its market price. It is owing to differences like these, that land may be found to command one number of years purchase of its rental, and rights be valued at another number.

only in a very wasteful form. Only the State or permanent Corporations or large owners, can really deal properly with high-forest. It may be then briefly stated that an area of *Forest*-land—

(*a*) Only serves in compensating wood rights:

(*b*) Only in the case where Corporations, Communes or Institutions are the R. H. to be bought out.

(*c*) And then only if there is legal provision for making the transferee manage properly and conserve, the forest grant.

(*d*) A forest plot can never be made use of, which in its existing position is wanted as "protective forest."

(*e*) Not only must the plots cut off not diminish the area of the remainder so as to leave it too small to be properly manageable, but the compensation plot must be itself of a size to be manageable as forest. The limits of this requirement cannot be stated exactly. Some laws have attempted to lay down 30 *morgen* (7·66 *hectares*) as the *minimum* size that is "workable"[1] as forest.

In the (rare) cases where "*Wald-abfindung*" is a suitable form of compensation there are technical rules for valuation, which would not be useful to us.

(3) In some special cases, rights can be conveniently compensated with plots of land that are neither fit for the plough, nor for forest. A grazing right may perhaps be compensated by a bit of land that is fit only for grazing or meadow land. Turf-moor may possibly suit fuel rights; or a plot producing sedges, reeds and rushes, may satisfy certain litter-rights (*streu*). I do not think it necessary to say more on this head.

(4) Payment of a capital sum in money, needs no remark. It consists simply in paying in the lump, the capitalized value of the right.

### (II.) *Rent or Periodic Payments.*

Payment in kind would rarely (see p. 375) come into use in Indian Forests; it needs only a passing allusion. It consists in giving a yearly quantity of some kind of wood, or say of rye to feed pigs (in compensation for a right to feed them on beech mast in the forest) or a supply of straw or other farm litter in lieu of forest "streu."

Payment in money may be of a capital sum (above alluded to) or in yearly allowances. The former is preferred by the forest-owner, as it leaves his estate undiminished in extent and yield capacity; whereas giving land-compensation reduces his estate, and giving a yearly pay-

[1] The remarks on this (Vol. I. p. 218) are worthy of attention: usually a larger area would be required for high-forest management than for coppice.

ment subjects it to a continuing charge. Money is always an admissible form where the produce of the right is one that *can* be dispensed with; and sometimes even where the produce is in itself indispensable: *e.g.*, in the case of rights to gather fruits, mushrooms, &c., or to feed pigs on beech-mast or acorns: money is here just as useful; at all events it directly enables the R. H. to supply his want in some other way: he can, *e.g.*, easily find some other food for his pigs, if he has the money to pay for it. Sometimes (but not always) he can buy manure to use instead of the forest humus and leaves. Sometimes too the right may be in itself indispensable, as the right to wood; but wood can always be bought if money to buy it is available.

Money compensation is of course always resorted to when land is not available, or not available of the kind required; or where the law expressly requires it: or where there is a right of choice, and money is chosen.[1] In the German law, they distinguish yearly payments (*Rente*) as "fixed" and "variable," "perpetual" or "for a term."[2] Where rents are perpetual they constitute a special form of compensation: but in some cases they are liable, at a subsequent date, to be converted into a capital (*ablösbare Rente*); in that case it is in reality only a case of deferred capital payment. The sum payable as "fixed" rent is the yearly sum which is equal to the interest (at a given rate) of the (sum assigned as the) capitalized value of the right. ($R = C \times \frac{p}{100}$.) In that case it represents the permanent average yearly profit from the right. If the rent is "variable" (but some laws do not allow it to be so) the amount is fixed from time to time, for periods, with reference to the yearly amount of the produce as valued at the successively increasing or falling market prices.

### (v., vi.) *Officials and Procedure.*

These are special to the different States in which the law applies. In Germany, generally, the result of former historical conditions of agricultural life has been, that land-ownership was in a confused state: the old peasant land-holders had their holdings consisting of strips of land scattered about—the relics of an ancient system which aimed at equality of advantage in the several holdings. There were also many burdensome land-charges (*Reallast*) and other sources

[1] See the different laws in Danckelmann, Vol. I. p. 236 ff.

[2] There are also "*Vollrente*" and "*Stückrente*"; but these are not different kinds of rent, they refer only to cases where the whole right is compensated, or only part of it;—as where a R. H. having grazing for 200 cows, is compensated for 150, leaving fifty to graze and taking a yearly payment in lieu of the rest.

of difficulty, so that a process of consolidating holdings and freeing the land of burdens, became desirable. To facilitate this, special legal proceedings were authorized, called generally, "*Auseinandersetzungen.*" For these proceedings, the ordinary Civil Courts were not found suitable: so special officers were appointed and empowered to effect settlements by means of friendly discussion, compromise, arbitration, and the like. They were in short what we should call "Courts of Conciliation." Such Courts were naturally adapted also for the settlement of questions of Forest-rights, their regulation and compensation. In India, the Forest Settlement Officer acts very much like a Court of Conciliation: at any rate his widely *equitable* jurisdiction, and informally free procedure, enable him to combine the functions of a conciliator with those of a legal officer or Civil Court. In Germany, there are Courts with jurisdiction over the whole State (*Landesbehörden*); over the province or district; and over a "circle" or other smaller local jurisdiction. Of the first class is the "Minister of Agriculture, Crown Domains and Forests." He has the ultimate control of all the executive proceedings and general conduct of the officials in these cases. And for purely judicial matters, the final Court of Control (for the whole kingdom or State) is the "*Ober-Tribunal*" which hears the final appeals when they are allowed by law.

In the province, the "*General-Kommission*" is usually the superior authority. It is a Court consisting of at least five members (who must possess certain qualifications as to knowledge of land and agricultural matters) under a President; and before this Court, proceedings to regulate or compensate rights are instituted. In some provinces, the same functions are exercised by a "department" of the provincial executive government (*Regierungs Abtheilung*); but as these are executive and administrative, not judicial, authorities, they are assisted by "*Spruch-Kollegien*" to settle matters of law: the latter are constituted with five or more members (like the General-Kommission).

Locally, there are "special Commissaries" appointed to carry out on the spot, the directions of the Provincial authorities. They put into form the proposals for the arrangements to be made; draw up the issues of law—if any—which may be in dispute; and they have power to rule, *ad interim*, any questions as to present possession of, interfering with, or using, property; which orders must be obeyed until a final decision is issued by the proper authority.

There is an appeal from the "General-Kommission" (or "*Spruch-Kollegium*," as the case may be) to the Provincial "*Ober Landes-Cultur Gericht*" (it used to be called "*Revisions Kollegium*"). And where

the order of this Court is not final (as it is in some cases) there is a final appeal to the (State) *Ober-Tribunal.*

I must not omit to notice that there are a certain number of persons appointed in local circles (*Kreise*) who are experts in land valuation and in agricultural matters, and who can be entrusted by the authorities, with special acts and duties in the course of the proceedings; they may aid in friendly settlements, make plans, and furnish reports on special points sent down to them by the Provincial authorities in deciding cases or in appeals from the rulings of the Special Commissary. These officers (*Kreisverordnete*) are essentially experts; they may act also as arbitrators and referees. They are paid by fees, and by a diet and travelling allowance, in each case, not by fixed salary. Experts (*Sachverständige*) of this class, only give an opinion, which may be contested: but if they act as arbitrators (*Schiedsrichter*) their decision, as such, may be binding.

Briefly it comes to this, that proceedings for the regulation or buying out of forest-rights are instituted before the Provincial Court. This Court can refer to the Local (Special) Commissary to intervene and discuss the matter with the parties and formulate proposals. The Commissary can call in the aid of experts, either to arbitrate on specific points, or to give an official opinion as to values, rates, and the like. There is an appeal to a Provincial Appellate Court; and in some cases a further final appeal to the State Court of last instance, on points of law. I do not think it would serve any useful purpose to give any details about the formalities of the Legal Procedure.

# LECTURE XXIII.

## THE LEGAL PROTECTION OF FORESTS AND THEIR PRODUCE IN TRANSIT.

### (I.) OF FORESTS.

HAVING explained how the vast area of waste and forest land is dealt with from the point of view of Forest law (Lect. XVI.), and further explained the steps taken to constitute legal forests (Lect. XVII.), I have now to proceed to the consideration of the manner in which the law provides a legal protection for Forest Estates. This will really resolve itself into the consideration of the law of the *Reserved Forest*, and, under the Indian Act, of that of the *Protected Forest* in Chapter IV. No other class of lands calls for any special explanation, for when the Forest Act is applied to them, it is always the provisions of Chapter II. or IV. in whole or part.

In Madras and Burma, where Protected Forests are not recognized, the protection, as regards soil, trees and natural produce, of lands not regularly taken up as Forests, is effected by Rules, the breach of which involves a penalty: about such local rules nothing need be said.

Where *Village* forests are recognized by the Indian Act, it is as subject to the same protective provisions as State Forests under Chapter II. In Burma such forests are simply protected by Rules.

*Private* Forests, where they are interfered with, are primarily subjected to special orders, and if the orders are not obeyed the result will be that the area will be taken under State control as a regular forest.

Voluntary submission of Private Forests to conservancy, also entails their being managed either as Reserved or Protected Forests.

The "protection of forests" is the third of the five main topics of Forest law already enumerated (pp. 197, 198).

A great deal of the *protective work*—perhaps the most important part of it—by which forests are secured as to their soil and

upper growth, depends not on laws or rules, or the imposition of legal duties, but on various operations of forest management; and you will remember that "forest protection" forms a distinct head of your study of Forest Science in general.[1]

Here we are concerned only with protection *as far as it is effected by law*. This protection is given both indirectly and directly. It is an indirect protection, when the law orders the *regulation* of forest rights and requires right-holders to act in such a way as to *spare* the forest. I have before mentioned that I considered the provisions about demarcation of boundaries to be more conveniently treated under the head of "Protection" (p. 274).

*Direct* legal protection is effected:—

1. By provisions which tend to *prevent* offences and also calamities by fire, &c.
2. Provisions which impose duties of helping when called on, and giving information; and
3. Provisions which declare or define offences, and award penalties for the commission of such offences.

### *Indirect Protection—Boundaries.*

With regard to the *indirect* means of legal protection, I have elsewhere so fully dealt with regulation of the exercise of rights (which really embraces the greater part of the subject) that I have only here to speak of demarcation. I have already noticed that it is a *final stage* of the process of constituting State Forests under Chapter II. After all claims are settled and the period of appeal has gone by, the boundaries are finally adjusted, are clearly marked on the ground, and are publicly notified (Chap. II. secs. 19, 20).

As a matter of fact, in the midst of a fairly reasonable and law-abiding population, the mere act of putting as it were a girdle round a certain territory—setting up marks and publishing the fact, is itself enough, to some extent, to secure the forest. The area is at once regarded as a Government territory which must be respected. Not only so, but clear demarcation is

[1] For this reason I have nothing to say about *fencing*, or where it should be adopted, if the whole area cannot be fenced, nor about fire-tracing, nor about protection from insects and injurious animals. I may only add with regard to the destruction of insects by *birds*, that the rules which can be made under the Forest law about hunting and shooting, may be made use of to protect birds which are useful in keeping down insect pests.

essential to success in dealing with offences. For the acts which the Forest law prohibits and makes penal, are often acts which *outside* the forest would be of little consequence; hence it is of the first importance that no one should be able to make the excuse, "I was not aware that I was inside a forest."

There is nothing in the Act which requires that any particular form or method of demarcation should be adopted. A forest may be clearly "meted and bounded" by natural marks, such as a steep cliff, a river, a distinctly marked ravine or glen, or the crest of a ridge. A permanent metalled road, a railway or a canal may also sometimes serve as a line of boundary; all depends on whether the natural features made use of, are permanent, and are such as the most ignorant could perceive to be boundaries as notified. Boundary pillars may then be only required at intervals, to carry serial numbers. Trenches, continuous or interrupted, are often used as boundary-lines. And in dense jungle countries, cleared lines are often the most efficient and satisfactory.

In any case, the boundaries *must be easy to ascertain*. It is not right to punish people for trespass when they cannot really tell whether they are inside the State Forest or not; when pillars or marks are so far apart, or so badly placed that, given one pillar, it is only possible for a Forest Official, or an expert, to tell in which direction to find the next.

Pillars or marks should always be made to carry serial numbers;[1] hence some marks of the kind are necessary even when the boundary line is also indicated otherwise.

Unmetalled roads liable to deviate or be obliterated, trees which may be blown down or cut down, should not be adopted as permanent boundary marks.[2] This is of course speaking generally and on principle. There may be localities, as in Burma, where in our present stage of management, boards

[1] A most essential practice. The pillars can then be identified on the maps; and guards going on their rounds and discovering a broken pillar, or the fact of some encroachment, can at once report the fact with reference to the boundary numbers. So fires and other offences can often be at once localised by aid of the numbered pillars.

[2] This is prescribed also in the Prussian practice (Eding, p. 33, *et seq.*) and in Saxony (Qvenzel, p. 181). The Prussian law objects to all tracks, footpaths, and small streams, as they are liable to change their courses and are uncertain.

In India it is the practice, in case of a disputed boundary, to bury charcoal, fragments of pottery, etc., under the pillars, so that, if the pillar is destroyed, the site can be afterwards established beyond doubt.

painted white and fixed to trees at intervals along cleared lines, are very efficient marks.

The Land Revenue Law of each province contains provisions for the maintenance of boundary marks of revenue-paying land; and it may be that there will also be forest boundaries where the forest adjoins revenue-paying land.

Forest boundary pillars often stand entirely in the forest, or between it and Government waste land, so that the cost of erecting them and of repairing them afterwards, is borne by Government. But it may be in some cases that the pillar is between a revenue-paying estate and Government land, and then it may come under the Land Revenue Law (or the Bengal Survey Act), and the District Collector may have jurisdiction to apportion the cost of the marks.

Wilful damage to boundary marks, can in *any* case be punished under the Indian Penal Code; but any wilful offence against forest boundaries had best be prosecuted under the special provisions of the Forest Act, sec. 62 (Burma, *id.*) for reasons which will be found explained in the closing pages of this Lecture.

The Continental laws all contain rules for the determination of boundary lines and their indication by marks.

In these countries, however, the forest property of the State is nearly always contiguous to some private property, because the whole area of the country is occupied, and not as in India, partly waste. The provisions of the law are therefore different.

In France either the State (forest proprietor) or the neighbours, may demand that the boundary be determined and laid down. Disputes about it are carried to the Civil Court. A written record of the proceeding (*procès verbal de la délimitation*) is prepared and deposited,[1] much in the same way as the record of a boundary case is in Indian Land-Settlements.

The Italian law applies to all forests (no matter whom they belong to) when found on mountain slopes up to the limit of the growth of the chestnut; and above that, if they are of a "protective character." All forests under the law up to the limit mentioned, and all that in other positions are specially exempt, must be permanently demarcated (*siano segnati i confini con termini inalterabili*), and descriptive registers of the boundaries are prepared.[2]

[1] Code For. Arts. 8–14; Curasson, Vol. I. p. 149. There are some further details about laying down part of a boundary or proceeding to demarcating the whole estate, which I do not think it necessary to enter on.

[2] Law of June, 1877, Art. I., and royal decree for its execution, Arts. 17–19.

The German laws provide that either of two neighbouring estates can claim to have the boundaries fixed and indicated by permanent marks (*feste erkennbare zeichen*).[1] Under this rule the State Forests can be (and are) demarcated.

### *Direct Protection—Prevention of Fire.*

The most important of the *directly* protective provisions relate to fire. Under this head are the Rules which are made, not only to punish acts of setting fire to the forest, but those which tend to prevent fire from reaching the forest.

Section 25 (*b*) (as amended by sec. 7, Act V. of 1890) empowers the Local Government to make rules regarding kindling fires, and to make people responsible not to leave camp fires, &c., burning so as to endanger the forest.[2]

Section 25*c* prohibits the *kindling, keeping or carrying* fire in a Reserved Forest except at such seasons (*e.g.* during the rains when there is no danger) as the Forest Officer notifies.[3]

In *Protected* Forests, rules (sec. 31*b*) may be made to protect timber lying in the forest, and also "reserved trees" (under sec. 29, *i.e.*, certain valuable kinds) from fire. And sec. 32*d* prohibits, not only setting fire to the forest, but also kindling a fire without reasonable precautions; and sec. 32*c* prohibits leaving a fire burning in dangerous neighbourhood to timber lying, to valuable trees, or a closed portion of the forest.[4]

Naturally it is fire that is the great enemy to forests, and it is not surprising a certain degree of detail has been devoted in the Acts to the subject of its prevention.

[1] Qvenzel, p. 167, and regarding record of the boundaries.

[2] The Burma Forest Act contains provisions similar to those of the Indian Act with regard to rules about *leaving fire burning* in the forest. It may be necessary to explain that in many cases the forest is large, and travellers require to halt for the night inside the forest, and light fires for cooking, etc. The rules would be made regarding the clearing of camping grounds and the lighting fires in such places; and the extinguishing of them when the traveller proceeds next day on his journey.

[3] Under this head would come provision in connection with *shooting parties*, from which danger is apprehended by the fall of burning wads and the like. This provision would also prohibit smoking in a Reserved Forest, as the burning end of a cigar, or burning tobacco from a pipe, or a hot coal from the Indian "huka" might, in dry weather, set fire to the forest. In Europe the regulations sometimes prohibit pipes without covers; but the Indian law would prohibit the keeping or carrying of fire at all. The carrying of *torches* at night, it is perhaps hardly necessary to add, is just as much an offence as any other form of fire carrying. Persons must not travel at night through forests (unless at a season when the carrying of fire is allowed).

[4] As an Appendix to the Lecture I have printed a brief summary of European law about forest-fires.

*Prevention of Offences—Information and Help.*

As to the prevention of other offences, the law is necessarily more general, and sec. 64 (and *id.* Burma Act) provides:—

"Every Forest Officer *and* Police Officer *shall* prevent and may interfere for the purpose of preventing, the commission of any forest offence, (*i.e.*—by definition—any offence punishable under the Act or a rule made pursuant to it)."

A second kind of protective assistance is obtained by laying on certain persons, the duty of giving *information* to the Forest or Police Officers, and obliging them to give *help* under certain circumstances. Sec. 78 of the Act here gives the law; the duty of every person of the class indicated is:—

1. Without unnecessary delay to furnish to the nearest *Forest* or *Police* officer, any information he may possess, respecting the commission, or the intention to commit, any forest offence.

The penalty for breach of this duty is noticed at p. 430.

2. To aid (when a Forest or Police Officer demands it)—
   (*a*) In extinguishing a forest fire.
   (*b*) Preventing fire in the vicinity from spreading to the forest.
   (*c*) Preventing the commission of a forest offence.
   (*d*) Discovering and arresting the offender when there is reason to believe that an offence has been committed.

(This provision for help partly deals with *prevention* and partly with the *remedy* for *offences actually committed*, but it would be inconvenient to separate it.)

As to the class of persons on whom this duty is imposed, it consists of—

1. Every right-holder (in either Reserved or Protected Forest).
2. Every one permitted to take produce or to pasture cattle, &c., *i.e.*, every one who has a license or concession, or who has a contract or other permission to cut wood, &c., &c.
3. Every servant or employé of such right-holder, licensc-holder, contractor, &c.
4. In villages *contiguous* to the forest (this of course is a question of fact for the Magistrate to decide if there is any dispute), every person paid by Government (*e.g.*, the head-

man, patwárí, &c.) and every one in the village who receives any emolument from Government for services rendered to the village community.

Under this head may be mentioned sec. 80 of the India Act, which contemplates the case of persons being allowed a certain profit or share of the produce of a forest on certain *conditions of service*; the share may be confiscated on proof (in case of dispute) before an officer appointed to hold the enquiry, that the service has not been rendered.

Under this head also I may mention sec. 84, added by the Amendment Act of 1890: this is of a protective character by rendering specially liable persons who (in pursuance of departmental rules) are required to enter into some bond for work or duty, carrying a penalty in case of breach (*e.g.*, contracts for timber-cutting, forest work and service, &c.). Notwithstanding the usual contract law regarding liquidated damages and penal sums entered in bonds (p. 31), the contractor is liable to the whole penalty specified, and that it be recovered from him directly, as if it were an arrear of land revenue.[1]

*Direct Protection—Forest Offences.*

The remaining form of *protection* is punishment of *offences*, *i.e.* the declaration that certain acts are prohibited, and the provision of an appropriate penalty on conviction before a magistrate.

It will be observed that the acts which are punishable under the Forest law may sometimes be offences which would be punishable under the Indian Penal Code (the ordinary Criminal Law of the country, *i.e.*) even if no Forest Act existed; others are acts which become offences only with reference to forest conditions, and are therefore specially prohibited by the Forest law (and not by any other law). In some cases, the Indian Penal Code, being drafted with reference to *general* conditions of life and not to special circumstances, would not include the case. For example, *trespass* in the Code is only "criminal" when the entry is with the intention of committing an offence, &c. (pp. 93, 122),

[1] I presume that in case of a *real* dispute (one in which there was fair scope for argument) about the liability, either the Government would order the matter to be tried in Court, or the usual rule about land-revenue payments would apply. If a person is called on to pay land-revenue (on the proper order being issued) he must deposit the amount, but may bring a suit to get it back: *i.e.*, he takes the initiative and has to show why he is *not* liable to pay.

but in the forest, it is necessary to prohibit the aimless wandering about (off roads and pathways) which causes damage to seedlings and other risks of injury; especially as it is usually connected with the probability that the trespasser intends some theft or mischief.

But often the offence is one which has its general criminal aspect, besides its special aspect as destructive to the forest. In such cases, the Indian Penal Code will usually represent the graver aspect of the offence, and impose (or permit) a severer penalty. It is a matter of general principle that whenever two penal provisions are equally applicable, and the law gives no express indication that one or other is preferred, either may be followed. But to prevent any possible misunderstanding on the subject, sec. 66 of the Forest Act expressly provides that an act or omission, itself punishable under the Forest Act, may nevertheless be prosecuted under any other law, provided that the offender is not punished twice for the same offence. I have reserved my remarks on the application of the Indian Penal Code to the concluding pages, because many of these relate to timber in transit as well as to our present subject, and others relate to offences connected with forest work and administration, but not directly to the forest or to timber.

The offences against the forest[1] provided in the Forest Act itself, are different according to the class of forest—*i.e.*, according as they are under Chapter II. or Chapter IV.

(A.) *In Reserved Forests.*

Setting fire to the forest (sec. 25 *b*).

Kindling or keeping alight a fire in dangerous places contrary to rules (*id.*).

Kindling, carrying or keeping fire inside the Reserved Forest *except* at notified times (25 *c*).

Making a fresh clearing while the forest-settlement is in progress (25 *a*).

Clearing or breaking up land for cultivation or any other purpose, after the forest is established (25 *h*).

Cutting, lopping, burning, tapping (or notching) trees (young

[1] It will be observed that throughout this lecture I am speaking of the forest, and keeping the question of protecting *timber and produce in transit*, entirely separate, although of course the powers of prevention already noted apply also to them.

or old—and see definition of "tree") also stripping bark or leaves, or damaging in any way (25 *f*).

Negligently felling trees, or cutting and dragging the timber, so as to injure the forest (25 *e*).

Quarrying stone, and digging holes for sand, limestone, &c.,—this being a case of "collecting forest produce" (25 *g*).

Removing any forest produce, including unauthorized scraping of *humus* soil (*id.*).

Burning lime or charcoal and (generally) subjecting anything to a manufacturing process in the forest (*id.*).

Personal trespass; that is, wandering about off the authorized roads and paths, especially by suspicious persons with axes, tools &c.—cf. the French Code For. Art. 146 (25 *d*).

Trespass by cattle.

Unlawful pasturing of cattle.[1]

(B.) *In Protected Forests.*

Observe first, the way in which the matter is arranged. The *general utilization* of the forest is to be regulated, by the aid of Rules. These deal with the cutting, collecting, preparing and removing, the produce, including trees and timber (sec. 31 *a*): the licences to be issued for cutting wood and gathering produce for use (31 *b*) or for sale, (31 *c*) and the payments, if any, (presumably rare in the one case, and usual in the other) (31 *d*, *e*), and for the cutting of grass and pasturing cattle (31 *i*), for the clearing and breaking up of land for cultivation or other purposes in the forest (31 *g*); also for the protection of all *timber* lying, and only certain kinds of *trees*, against fire (31 *h*); also for hunting, shooting and fishing (31 *j*); and for the exercise of rights "referred to in sec. 28" (sec. 31 *j*).

And sec. 29 contemplates that certain *special measures by way of prohibition* may be taken:—

1. "Any class" of trees may be declared permanently reserved, *i.e.* be exempted from the rules which speak of trees ordinarily cut and utilized.
2. A portion of the forest may be closed for any period not exceeding 20 years; suspending all private rights over the closed portion, provided that the remainder of the forest is sufficient (and so situated) as to provide for the excluded rights in a reasonably convenient manner.
3. The quarrying of stone and burning of lime or charcoal, or the

[1] In the Burma Act, these offences are divided into two groups, one the lesser offences, bearing a smaller penalty.

collection or removal of *any* forest produce, and the breaking up or clearing, (for cultivation, for building, for herding cattle or for any other purpose), of any land in such forest, may be *prohibited*.

Then the offences against the forest will consist, either of breaches of the special *prohibitions* of sec. 29, or of breaches of the general *rules* under sec. 31.

They are enumerated as follows:—

Cutting, lopping, &c., "reserved" trees (32 *a*).

Collecting, removing, preparing, forest produce, or lime and charcoal, when such has been prohibited (32 *b*).

Breaking up land, &c., when prohibited (32 *c*).

Setting fire to the forest, or kindling a fire without taking precautions to prevent its spreading to "reserved" trees or to a closed portion of the forest[1] (32 *d*).

Leaving a fire burning so as to endanger trees (32 *e*).

Damaging reserved trees by careless pulling and dragging of timber.

Permitting cattle to injure them (32 *f*).

Infringing any *rule* made under sec. 31.

No prohibition under sec. 29 (except as regards the portion of forest in which rights are suspended), no rule under sec. 31, and no penalty imposed, has any effect against "a right recorded under sec. 28."[2]

I have only to add that in Burma and Madras, where there are no "Protected Forests," the protection of waste lands which are not formally "forests" under the Act, but in which grazing and

[1] Kindling a fire so that it would easily spread to non-reserved trees or the ordinary forest, is apparently not an offence; for the rules under sec. 31 (above mentioned) do not provide directly for preserving the *forest generally* from fire, but only "reserved" trees and "closed portions."

[2] What would happen if a right were pleaded, that is *not* "recorded under sec. 28," I cannot say; for the right is not declared cancelled, and by the general principles of criminal law, a right legally existing is a complete defence. But I do not think any useful purpose could be served by detailing the various technical difficulties that might be raised about Chap. IV. (resulting from the fact that originally it was drafted for *one* purpose, and has been (imperfectly) adapted to *another*).

It is important however to observe (as has indeed been noted before, p. 194) that the *prohibitions* being issued, the *rules* must not nullify them; *e.g.*, if trees are "reserved," the rules must not contemplate that they are available to every one to cut on a "permit," &c.

Fortunately in "Protected Forests," the population concerned are not likely to be able to raise technical objections: and practically, as *rules* under sec. 31, and *prohibitions* under sec. 29, would be notified together; the public would have in their hands what is to them, a simple code of rules, prohibiting some acts, and allowing others to be done in a certain way, or subject to certain payments.

wood-cutting are possible, is effected by a power to make rules which prohibit breaking up land or abusing the natural growth, under suitable penalties. The rules also provide for the proper utilization of the produce, and for levying charges for its use. In such cases, a plea that an act complained of was done pursuant to an established right or custom, would be (and was intended to be) a complete defence. But such a plea is rarely, if ever needed, because no Forest Officer would start a prosecution except for some clear act of abuse, which he knew could not be so excused. The provisions of Chapter IV. of the Burma Act call for no comment. Exactly the same remark applies to Chapter III. of the Madras Act, except that the provisions of secs. 27 and 28 should be noted as a useful aid to the protection of such areas,—enabling the Government to close for restoration, areas that have been burnt. Grazing in such closed areas is made penal.

I must in conclusion, refer to two offences for which the Act has provided a special punishment, and which illustrate the remark that, though offences might be brought within the terms of the Penal Code, the provisions of that Code are sometimes less suitable, being drawn from a different point of view to that necessarily taken in the Special Forest Law.

I refer to the grave offences of—

(I.) (*a*) Counterfeiting Government Forest marks (such as the "sale hammer" mark—indicating that a tree may lawfully be cut by some person, or the "Government mark" (indicating that the tree, &c., is Government property).

(*b*) Altering, defacing, or obliterating a Government mark.

(Observe that (*a*) the offence is making or using a *false* mark, and (*b*) it is cutting out or tampering with a *real* one.)

(II.) Altering, moving, destroying or defacing boundary marks.

As regards (I.) it is well to provide specifically for the offence —which has a widespread importance both as regards trees and timber in the forest, and timber in depots or in transit—because the corresponding sections of the Indian Penal Code (secs. 483, 4, 5) though they would probably be held applicable by the

Courts, in the case of *timber*, they would not in the case of standing trees.[1] Or again though sec. 484, I. P. C. extends its terms to "*any* mark used by a public servant to denote that *any* property" has been dealt with in a certain manner, it might be questioned whether any one of the actions specified corresponded with that of a Forest Officer putting a mark on a tree or on timber to indicate that it had been sold and paid for, and that it might now be removed without any liability under the Forest Rules. Section 484 indeed speaks of a mark indicating that the property "had passed through a particular office"—but it might be thought rather a far-fetched interpretation to apply this to the case of the "sale hammer" (or similar mark).[2]

As to (II.) in the case of *boundaries*, sec. 484, I. P. Code, apparently only contemplates the act as one of mischief to the individual pillar or mark, and therefore imposes the comparatively light penalty of one year's imprisonment with or without fine, as a *maximum*; whereas in some forest cases, the destruction indicates a grave and wilful offence, and a design either to resist and defeat the settlement of the forest, or to encroach on the estate and defraud the Government of its land, in which case the heavier punishment (maximum) of two years' imprisonment with or without fine, is rightly provided.

[1] The "Property mark" of the I. P. Code refers to marks on "moveable property" only (sec. 479). I refer throughout to the sections as amended, and newly worded, by the "Indian Merchandise Marks Act" (IV. of 1889).

[2] As to I. P. C. sec. 485, see a note further on, on the subject of timber in transit (p. 415).

## LECTURE XXIV.

### The Legal Protection of Forests and their Produce in Transit.—(*Continued.*)

### (II.) Of Timber and other Produce in Transit.

We now come to the fourth head of the topics with which Forest law is concerned (p. 198). Owing to the peculiar character of the timber and other material taken from a forest, it is more than usually likely to be made away with and fraudulently dealt with; and it has been found a practical advantage to the trade (and often the means of preventing serious breaches of the peace) that the Forest law should follow material of this kind, and protect it while in transit to the market or other destination.

Transit is either by land or water: a good deal of produce, not excluding poles and sawn timber (and in rarer cases timber in log), is taken by carts; and the smaller stuff, in head-loads, or on mules, asses and oxen. In this case especially, fraud is to be apprehended. People may steal material, or, oftener still, take a larger quantity than they are entitled to. Accordingly the examination of packages, the inspection of passes and invoices, the provision of certain routes by which transport is allowed (and the prohibition of others), so as to facilitate supervision, these are the obvious subjects on which *rules* are needed for *land* transit. It is also sometimes convenient to levy the price of the material, not in the forest, but on its way out, or at the examining station; or there may be certain tolls or duties to pay, other than the royalty or direct selling-value of the material.

Produce is also largely exported by boats. The most important and frequently used means of transport for timber, however, is river floating. It is universal in Burma and the Himalayan Forests, where indeed it is, in many cases, the only possible way of getting timber from the forests to the market; but there is hardly a province in the Indian Empire in which it is not more or less used. And when we reflect on the nature of this form of

transit it is obvious that many matters for regulation, arise. Ordinarily sawn sleepers and scantling (or whole logs) are launched from the timber slides into the upper portion of rivers where they are still in the stage of hill (torrential) streams, flowing (with many rocks and obstructions) at a rapid rate and with a comparatively sharp incline. The logs and pieces have to be entrusted singly to the water, and float along to the point where the river leaves the hill barriers and begins to assume its gentler course through the alluvial plains. At this point, the logs and beams are caught and formed into rafts, which thenceforward are *under control;* and then it is possible to make them stop for examination, or for paying royalty or duty or toll, as the case may be; there is also the question of the use of the banks of rivers in connection with tying rafts during the night, &c., and the question of preventing the obstruction of floating streams.

And then, again, notwithstanding all care, some logs and pieces will go past the catching places, sometimes before they are marked; or rafts break, and then pieces go astray; in this stage, as well as before the pieces are first brought under control, we have timber in the condition of *drift;* and rules are needed for the collection and proper disposal of such timber. Very often, too, drift timber is not caught or brought ashore under supervision, but it becomes stranded—and sometimes left high and dry by a fall in the flood: in this case it is peculiarly liable to be concealed and cut up by the peasantry, or "supermarked" by fraudulent owners and contractors. Sometimes, too, drift timber gets right out to the river mouth and even to sea, and the *salving* of it is a regular business; and people feel entitled to claim a reward for recovering the timber before they will give it up. This also is a matter to be regulated. Then, too, there are always questions about *waif* timber, consisting of broken bits bearing no mark, and especially of pieces (and sometimes whole stems) that have fallen into the water, when broken or uprooted by heavy rainfall and storms: such pieces of course have no marks, and the place of origin often cannot be ascertained. There is often some local custom or question of right, about appropriating waif pieces.

Lastly there are the depôts and stations at which timber is

stored, sometimes for months together; and a variety of rules may be required about putting timber in, and taking it out, determining disputes as to ownership of "supermarked" timber, and the like.[1]

The transit both by land and water are included in Chapter VIII. of the Indian Act (Burma Act, Chapter VI.; Madras Act, Chapter V.).

In the Indian Act, sec. 41 provides that the control of all timber (which term includes bamboos, dug-out canoes or timber fashioned), and all forest produce,[2] in transit by land as well as by water, is vested in the Local Government. In Burma, it has been thought sufficient to control the transit of timber only (sec. 43); but timber includes bamboos.

Such a wide power needs to be exercised with great discretion; on the other hand, it is absolutely necessary to leave it wide, since no exception is practicable without virtually destroying the provision itself. If some persons could, under any pretence or colour of legal exception, get some defined class of forest produce exempted from the control imposed by the Acts, it would be like a small hole in a cistern, which would effectually prevent its retaining any water at all. The Government forests would be gradually robbed, and the stolen produce

[1] The great timber station at Kado near Montmain is an instance. I visited it some years ago, and found an immense business going on; the "teinzá" or certificates of the timber in the depot, were passed from hand to hand like negociable securities, and the timber was only taken out when actually wanted. Here too all "salved" timber was brought in and registered; and periodically proceedings were held for determining who was the real owner of the timber, in the frequent case in which ownership was disputed as the timber bore the marks of more than one owner. This was a matter of the greatest benefit and security to the timber traders.

[2] "Timber," as already explained, can be controlled, no matter where it comes from—it may be cut in a field or a private forest or anywhere; the term involves no question as to the place of origin. But the various articles included by definition (sec. 2, under the term "forest produce") are divided into two groups or classes, and those in class (*b*) must come *from a forest*: so that it may sometimes be a question whether the land from which a given batch of produce stopped for examination, came, was a "forest" or not. If it was, the produce comes under the section; if not, it is free and cannot be subjected to control. And as the term "forest" has no special or legal meaning assigned to it in the Act, it is a question of fact and of the ordinary use of the terms (see pp. 199, 200). Practically, the possibility of such a question does not give rise to any difficulty. In the case of water-transit this is especially the case, because timber (and bamboos are included) is the chief thing controlled; and charcoal, caoutchouc, resin, varnish, lac, bark, &c., which are really valuable, are in class (*a*) of the definition, and no question as to their origin arises. If any considerable traffic existed, or came to exist, in any locality, and it became desirable to have the power of checking the transit of loads of fibre, or thatching-grass, or any other article not included in class (*a*) of the definition, an amendment would be necessary.

safely passed out under the pretence that the loads were not liable to stoppage, since there is not (as a rule) any external or immediately recognisable indication that timber or other material has come from one place or another. In the same way, owners of forest produce would get it stolen and safely conveyed away, without risk of detection, if only a loophole for escape were provided on the ground that the Act did not apply to *them*. But the safeguards against abuse are ample :—

(1) The control itself is not of an irksome or burdensome character.

(2) The exact local circumstances can be taken into account, since the precise *extent* of control is not laid down in the Act, but is dependent on rules to be made under sec. 41 ; and Government, as the guardian of the public rights, and of the safety and comfort of the people, would not allow rules to be made which were really oppressive.[1]

### *Transit by Land.*

The control of transit *by land* is effected under rules devoted to the following points :[2]—

(1) The transit may be confined to certain lines or routes, and the use of others may consequently be prohibited.[3]

This provision, as it stands in the Act, applies both to transit by land and water, although here I am considering these two

[1] Under the Indian Act, rules under sec. 41 require the sanction of the Government of India. The provision has been omitted in the Burma Act. Sec. 8 of Act V. of 1890 has introduced a further safeguard, enabling the Local Government to exempt certain localities, or certain classes of produce, from the rules.

[2] The Madras Act (also the Burma Act) has brought *under this head*, the question of *Government* extracting timber from public forests, across private land and paying for any damage it may cause (sec. 35 *f.*). I have noticed the subject under *right of way* (see p. 317).

[3] It will be observed that when the India Act gives power to the Local Government by rule to authorize routes for export, or to levy fees on passes, &c., the rule must specify the routes and fees. But the rule is often drafted so as to declare that an authorized route is one on which the Conservator has established depots for the examination of timber, and which he has duly notified, or the fees for passes are such as the Conservator shall, with approval of so and so, notify. This is illegal : it is held to amount to the *delegation* to the Conservator, &c., of an authority which the Act says is to be exercised by the Local Government itself, subject to the sanction of the Governor-General in Council. And so with regulating payments by rule under sec. 31 *d*. The rule must specify this, not say, that the payment is such as the Conservator of Forests in consultation with the Deputy Commissioner, publishes in the bazaar, or such like. In the Burma Act, it will be observed (sec. 36 *h*, &c.) it is said, that the rules may "prescribe *or authorize some specified officer to prescribe*" the fees, &c. ; this obviates the difficulty.

kinds of transit, for convenience, separately. In the case of rivers, or rivers which have several branches, it is easy to apply such a provision, and prevent floating of logs on other streams, or on other than certain channels. But by land it is obviously a question of the local configuration of the country, whether such a provision can be applied. In some places, the export lines will be few, and no others will be practicable; in others, besides main roads, there may be other byepaths, or even the possibility of traversing the open country at any point. Here, without the (altogether impracticable) aid of a hedge, or a cordon of forest guards, it would be impossible to apply such a provision.[1] When, however, circumstances render the rule desirable and applicable, the export or other "moving" of timber, &c., on unauthorised routes, would be illicit and constitute a forest offence.

(2) The rules may require that all produce in transit shall be covered by a "pass."

This pass will be conditional that the produce must stop and be examined, at certain convenient depots or timber stations; otherwise of course the pass would be of no use, since the material actually in the cart, or cattle load, might not in the least correspond with it.[2] Fees may be prescribed for the passes; they are usually of small amount, sufficient to cover the cost of printing the forms, and the pay of timber station establishments. The amount is prescribed in the rule itself, by the Local Government. Under some systems, the passes are paid for at higher rates, in which case the fee represents the royalty, or a price of the produce taken from the forest in virtue of the pass, which operates as a "permit" to go into the forest and collect, cut, or take what the pass specifies, the produce being checked on

[1] In such cases the best plan would probably be to say nothing about particular routes, but merely (under sec. 41 *e*) to provide for the establishment of depots for the examination of timber and produce on the most important and commonly used lines. If then people avoided them and found out an alternative line, it would be easy to establish another depot or set of depots on that, and so on, till all the really frequented routes were occupied, which under the circumstances, is as much as it is possible to do.

[2] It should be borne in mind that in practice, this passage of material along certain routes, with pass in hand, soon becomes a matter of well-understood custom, and gives no more trouble than getting a railway ticket and selecting the proper line and the right carriage, does on an ordinary journey. Exporters of forest produce are always "habitués"; they understand the routine, and if they are only honest and do not attempt to smuggle or conceal illicitly obtained produce, they are not really troubled by it in the least.

leaving the forest by comparing it with the pass on reaching an examination post.[1] This system is common in the lower hill forests of the North-Western Provinces, in the Central Provinces hills, and in the Melghát of Berar.

It is easy to see that the evasion of any rule as to getting a pass, producing it, giving it up when done with, and so forth, becomes a forest offence and is liable to punishment.

### *Transit by Water.*

Transit *by water* is regulated also by rules (usually called "River Rules") made pursuant to sec. 41 (B. 43) (M. 35). In the Panjáb and in British Burma, this is by far the most important means of transport; but it is also of great importance in parts of Bengal (the Sundarban and Chittagong for example), in Assam, and in the North-Western Provinces, as regards the produce of the Himalayan forests, and in Oudh. It involves a much more numerous set of rules, as there are many subsidiary points to be provided for.

The Government is vested by law with the control of rivers[2] *and their banks*, as far as the transport of timber and forest produce is concerned. (For the sake of brevity I shall hereafter speak of "timber" only—that is the principal article: the transport of produce other than wood, bamboos, firewood and hollowed-out or fashioned timber, being hardly cared for at all—see note at p. 408.)

It will be observed that this section does not claim any special right of property in the banks or any interest in or over the soil; any such right or interest may or may not exist, according to the ordinary law of land tenure and interests in land. A riparian owner may prevent timber being hauled up on his land or may have a legal right to levy fees for timber so landed: with that the Act has nothing to do. But the Government officers have the control of the timber, and may prevent it being stored so as to interfere with the passage of other rafts, and so forth; and may examine the timber (if the rules so require) or otherwise deal

[1] Called "náka" and by other local names.

[2] "River" includes creeks, canals, streams, and generally all water-channels, *natural* or *artificial*. (Definition.)

with it. The fact of the banks of the river being private property does not give the proprietor or any one else any "sanctuary" against the control of the river officer.

In the same way, where power is given by rule (sec. 41 *f*) (B. 43 *j*) to prevent obstructions of the banks, this will be understood to refer to the actual navigating way, and to interference with the customary and lawful use of the river and its banks as a public highway; not to any special interference with the proprietary rights of riparian owners.

The general power given by the section to make rules against obstructions in the river, is a very necessary one. Such obstruction is, however, most likely to occur in narrow creeks or arms, and especially in the upper branches and feeders of rivers, where sometimes the felling of a tree across them, or the throwing in of a mass of "toungyá refuse"—bamboos, vegetation and smaller trees from land cleared for cultivation—may prevent the floating of logs, and may cause a "jam" or barrier of logs to be formed, which may be not only very troublesome and even dangerous, but also very expensive, to clear.

The same power which has been noticed under the head of land transport, to fix certain routes and confine the transport to them, may also be applied in the case of rivers.[1] And here also the system of appointing certain "depots" or "timber stations," and requiring the timber to be covered by "passes" which are produced, and checked, when the timber reaches those stations, finds its most useful application.[2]

In some cases, these timber stations at or near the chief timber markets, forming as it were the "termini" of river transit, are of great importance.

Another very important feature in the business of controlling timber in transit, is alluded to in sec. 41 *h* (B. 43 *l*). This is a good example of the *preventive* action of the law which has already been noticed when speaking of the protection of the forest itself (p. 399). The presence of a number of logs floating about in a stream and often getting stranded for a time, when

[1] This power may be especially needed where the river divides into several channels, and which ultimately lead down to the same place. Those familiar with the Kado rules (Burma) will at once recognize the illustration of this which those rules afford.

[2] Sec. 41 *i*. (Burma Act, sec. 43 *h*.)

the water-level falls, or getting into a backwater; or the fact that a raft has been left at night moored against a bank, and may easily be set adrift,—these circumstances and many others, make river-timber a tempting subject for thieves and dishonest traders. Either the log can be got out of the river, concealed for a time in the sand, or in the long grass that so often fringes the river bank, and then sawn up and made away with; or the mark can be burned out (in which case the mark of fire is easily attributed to the action of jungle fires); or it can be cut out, the grain being artificially restored; or a mark can be altered, so that when the log reaches a depot, it is claimed by the holder of the new mark, and the true owner loses his property, supposing it to have gone adrift, or perhaps to have sunk.

The rules therefore have to aim at diminishing the facility with which timber can be *quickly disposed of by cutting up*, and hence it is made lawful to regulate, or wholly prevent within certain limits, the establishment of sawpits in localities where it is known that timber is, or easily can be, landed and cut up.

This provision is chiefly requisite in connection with river transit, but the rules could equally be applied to the establishment of sawpits anywhere, where there is the same risk of facilitating timber theft; and they might be applied, for example, to prohibit sawpits being set up in the vicinity of a forest.[1]

Tending to the same object as the regulation of sawpits, are also rules which may be made, prohibiting and rendering penal, the sawing-up (anywhere), the burning and concealing[2] of timber, without proper leave or authority.

[1] The French law has similar, and sometimes stricter, provisions. (See Code Forest: Art. 154, 155, and Curasson, II, p. 19–22, and *Puton*, p. 215.) These indeed existed originally in the Law of 1669. No sawpit (without machinery), Art. 154, or mill or establishment for sawing (*usine à scier*) Art. 155, can be set up without special authority of the "Government" (since officially interpreted to mean the order of the Préfet) on the borders (*enceinte*) of a forest, or within two kilometres distant from it. This rule does not apply to establishments forming part of regular towns or villages, which may happen to lie within the proscribed distance; but in such cases (as in *any* case where a "usine" is specially authorised) the timber conveyed into the factory or its yards, must be "passed" and marked by a Forest Officer (Art. 158). The Italian law also regulates the establishment of such places ("magazines and depots for timber and workshops (*opifizi*) for cutting up and converting timber") by Art. 45 of the law of June 1877. The Prussian law (Eding, p. 185) allows also the restriction of sawpits.

[2] This of course can only be done with a dishonest intention. What motive otherwise has a man for burying a log in the sand or covering it with a pile of thatching grass?

Then again there is the risk of *tampering with the property marks* on timber to which I have alluded. The rules may meet this form of river piracy, by making it penal to possess or carry marking hammers or tools for altering marks,[1] except under certain conditions.[2]

Such rules could not, however, work, unless supplemented by a system of *registering* timber marks; this ensures it being known what mark really indicates the property of one man or another.

For the expense and trouble of such registration, *fees* are charged; and thus the tendency to register more than one mark is checked, while at the same time men of straw are deterred from registering marks, having no timber really, but hoping to steal some from time to time and put their mark on it.[3]

Disputes at law are avoided, since the certificate can be sworn to as evidence that such and such a mark really belongs to such a person and indicates his ownership. Moreover, confusion is avoided, since the registering officer will refuse to allow a private person to register a mark already registered in favour of another person, or in use by Government officers for Government timber, or which is so like some one else's mark that a few cuts of a chisel, or other implement, will readily convert one mark into the other.

The registration also diminishes the facilities for using false marks. Supposing, for example, that a timber thief has, *en route*, cut out the marks on several logs and supermarked them with a spurious hammer, it would be found on reaching depot, that the logs bore a mark not to be found in the register, and such logs

[1] In Burma, they use (among other implements) small combs of metal, so that when the original marks have been pared off the surface of the log, the striated appearance or grain of the log may be restored by drawing the metal teeth over the smooth surface of the cut, and then applying a new hammer-mark.

[2] Nor is there any hardship in this. No honest timber owner can require to wander about the banks of a river with a marking hammer, still less with tools of which the very reason of existence, is a dishonest purpose. The proper marks indicating property, are necessarily put on the logs in the forest before launching, or on forming the timber into rafts, where the work is done specially and under supervision. If a trader has (exceptionally) reason to fear that a number of his logs have got adrift unmarked, so that he needs to follow them and mark *en route*, he must explain the special circumstances to a Forest Officer and justify the issue of a written permission to him to mark in transit.

[3] For at the time of registration, if such a person were suspected, enquiry might be ordered as to whether he really had timber; and if not, registration might be refused.

would be at once detained and delivery refused. This, it is true, would not prevent a trader who had registered his mark, from cutting off another man's mark and putting on his own, but to prevent such offences, the heavy penalty for tampering with marks, and the vigilance of the forest staff as River Police, must be relied on.[1]

The student will perceive that in all these cases, the infringement of the rules involves either wilful evasion for which there is no excuse, or fraud in some shape; therefore the law attaches to the offences the liability to double punishment in the case of second conviction, or if the offence is done at night, or after preparation for resistance.

To this chapter of the Forest Act, certain provisions are attached, the object of which is that Government should be saved from liability for loss of timber in case a flood or other accident, causes damage, while the timber is necessarily (or for the owner's convenience, as it may be in some cases) stored at or detained at, a timber station. (Sect. 43, and so in the Burma Act also.) At the same time, such loss may often be prevented if timely assistance can be procured, and so a further section (sec. 44) gives power to Police and Forest Officers to require the aid of certain persons in these cases. A person refusing to help would be liable to punishment under sec. 187 of the Indian Penal Code, therefore it is only necessary to impose the duty, but not to specify a penalty, in the Forest Act (see also at p. 430).

## Drift Timber and Salving.

There is another branch of the subject of "timber in transit" to which the Forest Act devotes a separate chapter. I allude to the subject of drift timber.

Ordinarily speaking, timber in transit is under control while it is going along with some one in charge of the raft or in the boat to which it is attached. But timber may get *out of* control and go adrift. It often happens that, from the effect of a sudden rising of the river, or from some other accidental cause, rafts get

[1] Besides prohibiting, marking, altering and effacing marks on timber in transit (sec. 41 *h*), the secs. 483 & 485 of the Indian Penal Code would be fully applicable to fraudulent marking of timber or having die-plates or for imitating forest "hammers," or private marking devices. As timber is "moveable property" no question would arise about the application of the sections.

broken up; they strike a bank or an island and go to pieces; in either case, the single logs float away without control, or, being deprived of the support of bamboos or lighter logs to which they are attached, sink in the water either at once, or after a time when they have become water-logged. Sometimes they get stranded on islands, and the water subsides and leaves them out of reach, or they may get caught in "snags" in the river bed.

In many rivers, as I have said, the logs are at first launched singly and left to take their chance till they reach some point where the stream debouches on to the plains and becomes a steady flowing river. At this point only the logs can be caught and formed into rafts. Above this point the timber is "drift," and in many places is subject to great risk of theft. Fortunately, in some rivers, the precipitous banks and torrential character of the stream make interference with the timber impossible, except at a few points, at which a look-out can be kept.

But it will often happen, too, that, when the logs reach the catching-places, some of them will, in spite of all care, go past them, and then they escape control and again become drift, so as to require protection under the rules. As logs so stranded or left floating without control, if marked, can ultimately be recovered and their owners found, *if some one undertakes the charge of them meanwhile*, it is obviously necessary that rules should be made to protect such property from being made away with, or from being further carried away, perhaps out to sea, and lost.

Moreover, all logs that are *not* marked and so become unidentifiable or "waif," are by the law of the land, the property of *some one*, whether the "Lord of the Manor," the Crown, or some one else: it is equally desirable that these should not be left to waste and destruction. Hence under the Forest Act, the Government assumes the *primâ facie* right of property in all unmarked timber within certain limits, and a right to *collect* and *manage* all *drift* timber, *i.e.*, both unmarked waif, and marked timber got loose; and the law provides a procedure, by which the collection of such timber is regulated and by which its ultimate disposal is arranged for.

Although, in British territory, the Government may, under sec. 45, declare the *primâ facie* right of the State to all unmarked

timber in certain limits, it is nevertheless necessary to understand what is meant by waif, for the right of the British Government to claim waif on its own shores is derived from the right of the former Native Governments. It seems to have been a long standing and well-understood custom among the Native States in the old days, that the Ruler is entitled to the waif timber within his boundaries; but this did not prevent the customary appropriation by local villagers, of scraps and fragments of small value. Consequently, though the British Government has succeeded to this right in its own territory, the Native States that have river frontage, still retain it in their own territories. As in some provinces, and notably in the Panjáb, many of the rivers which are the regular routes for timber transit, are so situated that one or both of the banks lie in foreign territory for some part of the river course, it is important to understand what "waif" timber, which either Government is entitled to claim, really is.

"Waif" depends on the principle which I alluded to in Lecture V. (p. 68). Logs become waif when every one "waives" a claim to them because individual ownership cannot be established.[1]

In the Panjáb, the Ruler of the State whose territory forms the bank, is entitled to the waif, and I have little doubt that the same rule would be held in other provinces.

Several of the Panjáb rivers run through foreign territory, as I said, or have one of their banks foreign. On the Sutlej, the Panjáb Government, as the paramount power over the Protected States, laid down (in 1871) the true rule on the subject. It is not the mere absence of a device, or mark in that sense, that makes a log "waif." For example, on the Sutlej it is believed (and this of course is a question of fact) that from no forests but Government forests, could timber in *log* get into the river at all. Consequently all logs, even though they have no Government mark or device, are identified as Government property (especially this is the case with logs cut by the cross cut saw), and they are not "waif" and cannot be claimed by the Chief on whose shore they may happen to be stranded, or within whose boundary they may happen to float.

[1] Originally in the barbarous law-Latin of the time, "*bona waiviata*" were goods abandoned, "waived" or thrown away in flight by a thief who was pursued. Where the owner of such goods was not traceable, they became the right of the Crown, or by grant of the Crown, of the Lord of the Manor.

I presume the same principle would hold good if there were certain forests from which alone certain kinds of wood were obtainable, and it was known who owned those forests: logs of this kind of wood would not be held to be waif or unidentifiable.

It is true that on the Sutlej, unmarked logs, showing root ends or being broken (not cut), and apparently the result, not of forest fellings but of storms or other accident, are allowed to be waif. Such logs are spoken of as "windfall." In these cases the chiefs are allowed to take the logs as waif,[1] but this is rather a matter of concession than of strict principle. They are given up because, though the wood may be the property of Government, they have not been appropriated or prepared at the expense of Government, and Government does not wish to press the principle of identification too far.

The State claims all waif on its own shores, but usually allows people to take smaller bits for their own use; the limit commonly being what one man can himself lift or carry away without assistance, and *sawn timber being not included* in the permission (or obviously many metre-gauge sleepers, and other such small scantling, would be carried off).

Under sec. 45, Government is empowered to exempt any class of timber from the effect of the sections declaring a *primâ facie* right of ownership.

It will probably be asked why the Government should confine its right to "waif" within "certain limits" (by sec. 45). The answer is, that as regards timber, waif by custom arises in connection with rivers and their banks; but in India river-banks are very uncertain things; in time of high flood, logs may be taken far inland, and when the water subsides, they may be left one or two miles or more, from the edge of the water. The Government therefore will desire to put a reasonable limit to the area within which it will claim to interfere with timber. It is usual under this section, to notify the chief rivers as under control down to a certain point in their course, and also to a certain distance on either side of the water line at its cold-weather level.

[1] The question is sometimes asked, must waif be wood actually cast upon a shore or island, or may the States entitled to waif, send out men on floats, &c., to swim after and catch, waif logs? There can be no doubt that waif depends on the condition of the log, not on the fact of its being in the water or on dry land. As long as the collection of such waif is made *within the boundary of the State*, that is the only question that can be raised. The boundary may be in the middle of the stream.

*Salving of Drift Logs.*

Chapter IX. of the Forest Act (B. Chapter VII.), regulates the collection of drift timber in the first instance, and provides the procedure for its disposal when it is collected. It is customary to speak of "salving" timber when it is adrift without control and floating on its way to the sea where it would be sure to be lost. In some cases it may be convenient for Government officers only, to undertake the work; but in most cases it would be a pity that private persons who see logs going past, should not be allowed to stop or salve them, and get a reward, provided precautions are taken that misappropriation is not encouraged under the name of salving. All this is provided for by rules made under sec. 51 (B sec. 51).[1] It will depend on the rules whether any given individual is or is not justified in salving timber. For it must be remembered that, as a general rule,[2] it is no offence in a person to take charge of apparently ownerless property, with the *bonâ fide* intention of securing it and restoring it to the owner; this, however, may be affected by the existence of rules having the force of law, which, in certain cases, prescribe that only certain licensed or authorized persons should interfere with it.

It will be borne in mind that drift timber is still "in transit," and therefore any cutting off of marks, burying, concealing, &c., is punishable as an offence against the rules previously described as made under sec. 41 (or in some cases against the Forest Act, sec. 62, or the Indian Penal Code).

Under whatever plan the drift timber is secured, it has to be determined what is to be done with it when salved. This will depend on circumstances. If the logs are salved in the water, they are easily taken in tow by a boat, or rafted up to a *drift, timber station* or depôt appointed by the (properly authorized)

[1] I would advise students to procure the rules in force on the Salween in Burma as a good illustration of the practical drafting of rules about salving. If the former practice is still maintained, it will be found that there is a certain part of the river where anyone may salve, provided he takes out a licence, registers the mark he uses to denote that logs are of his salving, &c. At another part, salving is only done by authorised "Government salvers;" or the collection is undertaken by official agency. In Burma, steamers often pick up valuable logs and take them in tow. They then give them up at a drift timber station, and receive the salvage reward.

[2] Indian Penal Code, Section 403, Explanation II.

Forest Officer under sec. 45. But there are many cases where this cannot be done.

The section therefore says that timber "*may*" be brought to such depôts. There are cases in which floods have left large heavy logs far inland; or where single logs, of perhaps great weight or size, have been carried singly or together, below the lowest timber stations, so that it would be inconvenient or costly to do more than secure the timber in some safe place. The rules under sec. 51 will arrange this, so that the salver may be bound to give notice to the Forest Officer; indeed in any case a landowner on whose land a log was washed, would run the risk of being charged with misappropriating the timber [1] if he did not make an attempt to find out the owner or give him the chance of recovering his property. The rules also would enable the logs lying singly where they are, to be treated just as if they had been taken to a drift timber station, and the same procedure regarding claims, &c., to be observed.

When the timber is brought to a station, or is deposited, as just described, the further procedure is so clearly laid down in the Forest Act, that it is only necessary to read the sections. But I may mention, with reference to the right of Government to unidentified timber in the last resort, that claimants should be allowed every chance of identifying their property before it is finally taken possession of as "waif."

Timber while it is awaiting a decision as to its ownership, or while it is retained pending the settlement, in a court of law, of a dispute between rival claimants, is not liable to any seizure or process of a civil, criminal, or revenue court [2] till it has gone through the legal procedure under this chapter. (Sec. 47 (B), sec. 48.) This obviates the chance of a collision of authority.[3] After the forest procedure is complete, there is nothing to prevent

[1] See section 403, I. P. C., and explanations. It is quite possible to commit the offence of criminal misappropriation for a time only; whence the necessity of communicating with the proper official. Of course it would be a question of fact whether a person had kept the timber so long or under such circumstances, that misappropriation could be concluded.

[2] In the Burma Act the Civil Court only is mentioned, because practically that is all that is required; no Revenue Court will practically require to attach timber, and if a Criminal Court does, it will be in connection with some offence, and under such circumstances, that there is no object in excepting it.

[3] I believe that such a difficulty did occur some years ago in Burma. While the Forest Officer was dealing with the timber under rules then in force, the Civil Court interfered, awarded the timber and took it under process of Court.

any Court issuing its order or injunction, or taking the timber under its own process.

In deciding claims, it will be observed, the Forest Officer makes the timber over to the person he thinks best entitled. This, of course, has no effect whatever as a binding decision that such person is really the owner.[1] Any other person might bring a civil suit and claim against the person who got delivery on the *primâ facie* appearance of his title.

If the Forest Officer cannot decide who is entitled, and so does not think proper to make it over at once to either claimant, he may refer the parties to the Civil Court, and retain the timber meanwhile. In either case, the suit must be brought within three months; if not, under sec. 48, the timber will finally vest in Government, or in the person to whom the timber has been made over, as the case may be. If the timber will vest in Government, the Forest Officer must take his own steps to ascertain the fact of a suit having been brought or not, before he takes possession.

Nothing is said in the Act about the Forest Officer arbitrating by consent of the parties.[2] There would, however, be nothing to prevent their agreeing to his arbitration, and the best plan would be to proceed under sec. 523 of the Civil Procedure Code. The Forest Officer is, however, in no way responsible for this; all that he need see to is that the parties agree in writing to his arbitration, and he may give his decision, leaving it to them to pursue the steps necessary to enforce it. Nor would he be responsible if he made over the timber in accordance with such a decision, because the Act authorises him, in any case, to make it over to the party whom "he deems" entitled to it.

Nor is the Forest Officer liable for anything he does in good faith under the section, nor is Government liable for any loss that may happen during the detention of the timber. (Sec. 49 (B) 48, 79.)

[1] Nor in a subsequent civil suit could a person appeal to the fact that the Forest Officer had made the timber over to him, as a proof that in fact it belonged to him rather than to the other party. But the Forest Officer might be examined as a witness, as to any technical or other knowledge he possessed, which might throw light on the question of ownership.

[2] In which case the ordinary law would apply. It is quite likely that if the Forest Officer is known to have experience, the parties will agree to abide by his arbitration.

When timber is made over to a claimant, there will usually be a "salvage" fee (provided under rules made pursuant to sec. 51) due, and possibly other expenses also. No person can claim to take away his timber till he has paid these charges. But no expenses can be so charged (sec. 50), but such as are distinctly provided by the rules to be levied.[1]

If such fees and charges are not paid, secs. 81 and 82 of the Act must be brought into play: the Forest Officer may sell the timber and recover the money due.

Offences against salvage and drift timber rules are punished by such penalties as the rules themselves provide.

[1] "Salvage fees" consist of a sum which is purely in the nature of a reward for the risk and exertion undergone in saving the timber, whether by Government or private agency. "Other expenses" will be the actual cost of moving, rafting, or storing timber, and may include a charge the object of which is to defray the cost of any special establishment necessarily entertained.

# LECTURE XXV.

## THE LEGAL PROTECTION OF FORESTS AND THEIR PRODUCE.—(*Concluded.*)

### Use of the Indian Penal Code—Special Penalties—Cattle-Trespass.

THERE are still a few more points to be considered in connection with the legal protection of forests. Sec. 66 of the Act reminds us that there *may be* the application of other laws; and certainly, as we shall see, it was always intended that certain grave cases should be punishable under the (usually severer) provisions of the I. Penal Code. Next, there are some special matters in connection with *penalties* to be noted; and lastly, we must say something of the law under which the forests may be protected against cattle-trespass.

In the last Lectures, you will have observed that I spoke chiefly of protection against fire, and against acts of mischief and trespass, as directly defined in Rules made under the Forest Acts, or by sections of the Acts themselves. It is clearly more convenient (wherever possible) to make use of that law which most directly and expressly prohibits the very act which we have to prosecute. And some of the acts prohibited in forests, would not be offences in ordinary cases, and are therefore punishable under the Act and not otherwise. And again with reference to the Forest Act, sec. 62, though the use of fraudulent *property-marks*, and the destruction of boundary pillars, are both provided for in the I. P. Code, still (as we have before noticed) the provisions of the Code are not suited to the case of forest-timber marks and forest boundaries (p. 404), so that the Forest Act itself is here the best to take action under. In all these instances, we had, in fact, a class of cases in which the Forest Law itself was alone applicable, or at any rate was best applicable. But we have now further to take note of cases where the Indian Penal Code *may* be applied, and some where it is the *only* law applicable.

In short, we have three classes to think of :—

I. Cases where the *Forest Law only* can be appealed to; as with specially "forest" offences: or in cases under sec. 62.

II. Cases whether *either* the F. Act, *or* the I. P. Code can be followed.

III. Cases where the *I. P. Code alone* is applicable. And in II. and III. the application of the I. P. Code may be—

(*a*) to cases *directly* concerning the forests;

(*b*) to cases *indirectly* concerning the forests, but connected with the forest service and administrative business of the Department.

As regards Class I., we have nothing to add to what was said in the last Lectures. As regards Class II., it is obvious that every act of mischief and injury to trees, or clandestine removal of timber or produce, would clearly (and without any refined argument or stretching of terms) come both within the terms of the Forest Act and Rules and also of the I. P. Code. It is then for the prosecution to consider which law it is best to proceed under, according to the circumstances of the particular case. If prosecution under the Act and Rules will result in a sufficient punishment, there is this advantage, that the offence is provided with a direct penalty, suited to its immediate aspect as a forest case, and further, the trial can (section 65) be with that shorter and simpler form of record which we have already described (p. 167) as the "summary trial." For all offences where a sufficient punishment can be given under the Act and Rules, the prosecution will naturally be under them. Even cases of "marking" or cutting up timber, which in themselves are always more criminal and better known to be offences than forest trespass, are often quite as well treated under the rules. And we have already noticed, that the Rules themselves, in the case of offences connected with timber in transit, provide for *double* penalties if the offence was committed at night, or after preparation for resistance, or there had been a previous conviction. But where there is a grave case, and a full penalty is called for, it should be a matter for a regular criminal trial under the Code. A serious forest fire wilfully caused, may demand the

penalty of seven years' imprisonment and fine under sec. 435 I. P. C. A slighter act, or a merely negligent one, would be dealt with under the sec. 25, or 32 of the Forest Act.

Any aggravated case of timber theft or extensive cutting of trees, should be charged and tried under the Code, as a rule. For the Forest Act, as I have already observed, regards such acts rather from the point of view of mischief to the forest growth, or interference with the course of control, than as infringements of the rights of property. The framers of the Act always contemplated that cases in which a distinct intention to steal and to cause wrongful loss to one party or wrongful gain to another, should be prosecuted as offences against the ordinary Criminal Law.

III. And there are some few cases, where a prosecution is evidently possible and yet can *only* be under the Code. For instance, no notice of "abetment" is taken in the Forest Act; this clearly implies, that, as abetment of *any* offence is punishable under the Code (by definition of the term) the Code would be resorted to in any case where it was requisite for the ends of justice to prosecute. "Attempts," where they are punishable at all, come under the same rule. And so the breach of a duty to give aid or information, or other breach of duty where no special penalty is imposed by the Forest Act, must be dealt with under the Code.

It is hardly necessary, perhaps, to add that there may be offences committed in lands not regularly under the Forest Act, and that in such cases, unless some local rules or special provisions exist (having the force of law) the prosecution *can* only be under the ordinary Criminal Law, *i.e.*, under the I. P. Code.

Speaking next of all cases generally, in which the I. P. Code must be, or can be, applied; the offences *directly* connected with forests, which may be prosecuted under Penal Code, are—

*Theft* or *criminal misappropriation*, with its attendant offences.
"*Receiving stolen property.*"
*Mischief.*
*Criminal trespass.*
*Abetment of offences.*
*Attempts to commit offences.*
*Omission to give information, aid, etc.*

As regards theft (I. P. C., sec. 378) its nature has been explained (p. 118). It is only necessary here to repeat that the property (in a case of theft), is *moveable*, and is, at the time, *in the possession of* the person wrongfully deprived. Trees in a forest, demarcated and declared, are, at any rate, "constructively" in possession of the Forest Officer of the Government who is owner, and though they are "immoveable" while still standing, they become moveable by severance, and the Act of severance would involve a "moving" which is sufficient to complete the theft.

If the property is not at the time in possession of anyone, as if a log is lying on a river bank or island, or a bundle of grass by the roadside, then the offence is not theft but *criminal misappropriation*. (Sec. 403.) The "explanation" attached to this section in the Code to this offence should be remembered. In the first place, a dishonest[1] misappropriation or conversion to a man's own use for a *time* only may be an offence. Supposing, for instance, a person having salved a log of teak should keep it in his yard and make no attempt to inform the Forest Officer, or to find the owner, this might be, according to the circumstances, a misappropriation punishable under sec. 403. It would be a question of fact whether the detention was for such a length of time as was not natural or necessary, supposing the accused person to have had an honest intention of finding the owner or applying to a Forest Officer. This example also includes the 2nd explanation to sec. 403, which is that it is not misappropriation in the first instance, to take possession of property for the purpose of protecting it and restoring it to its owners; but it becomes an offence, as just stated, if within a reasonable time, steps are not taken to give notice, or discover the owner.

It is not necessary that the finder of property should know who is the owner, or that any particular person is owner: he misappropriates it if he does not believe it to be *his own* (and yet makes no attempt to discover the owner).

In some cases, when no owner can be found, there cannot be a misappropriation, because then the thing really becomes "*res*

[1] "Dishonest" (by definition) means an act which causes either "wrongful gain" to one party or "wrongful loss" to another, or both. "Wrongful" in this phrase means gain or loss which the person is not legally entitled to enjoy or to suffer, as the case may be.

*nullius*" (p. 68). Under the Forest law, however, as regards timber in transit, this excuse would rarely avail, since Government is declared by law to be *primâ facie* owner *of all* unmarked, and drift timber, within certain limits (sec. 45). A man could not, for example, pick up a sleeper lying on a sand bank, and say, "I may take this because it is so exactly like thousands of other sleepers that it is impossible for me to find an owner;" for the *primâ facie* owner is, by law, the Government.

Cases of *breach of trust* (secs. 405-6) can hardly occur except in cases of contract to remove timber; but this is not really a direct forest offence, so I shall mention this subject afterwards.

Closely connected with theft is the offence of "receiving or retaining" stolen property, knowing or having reason to believe that the property is stolen. This is an offence which, not being specifically mentioned in the Forest Act, must be prosecuted under the I. P. Code. Any property, the possession of which has been transferred by theft, extortion, or robbery, or which has been criminally misappropriated, or in respect of which a criminal breach of trust has been committed, is "stolen property." (Sec. 410.) "Dishonestly" receiving or retaining this is punishable under sect. 411. And there are other sections following, which may also be applicable; for example, the *habitual dealing* in such property is punished under sec. 413; and *assisting* in the *concealment* under sec. 414.[1] Any one of these offences is likely to occur in connection with timber thefts.

To sustain a charge of "receiving" it is necessary to show (1) that the receipt or detention was *dishonest* (*i.e.*, with intention of causing wrongful loss or wrongful gain; this fact is usually to be inferred from the circumstances of the case: (2) that the offender either knew, or had reason to believe, that the property was stolen, or obtained by misappropriation, &c. This is also usually to be established by the circumstances, such as the time and means of getting possession (whether at night, in secrecy, taking it at

[1] Under sec. 414 I. P. C. could be tried a bad case of "concealing" timber (see Forest Act, section 41*h*), which would be insufficiently punished with six months' imprisonment. The section 414 provides for cases which are in fact very like the abetment of section 411. The accused does not himself "receive" the stolen property, but he helps some one else in disposing or making away with it: as where a goldsmith melts down stolen silver coins or ornaments (knowingly), and so helps the thief or some receiver to conceal and dispose of his booty.

very much below its value, &c.), the way in which he dealt with the property afterwards (such as burying or concealing it, &c.). These matters afford indication of guilty knowledge. Especially important is the common case where the accused cannot or will not say how he obtained the property which has *recently* come into his possession.[1]

*Mischief* is an offence defined by sec. 425, Indian Penal Code. To constitute it, there must be an *intention* to cause, or a *knowledge* that it is *likely to cause*, wrongful loss or damage to the public or to any person. It is obvious that mischief may be of various classes, and so be of different degrees of criminality, according to the *means* employed in producing it, according to the *value* of the property injured or destroyed, and according to the nature or *public utility* of the property damaged. *Mischief* relates to *property* (including animals), not to *men*.

Mischief in general, is punished by sec. 426. Recourse in forest cases would not be had to this section, because the minor forms of mischief (adequately punishable with fine or with imprisonment up to six months) are all specified in the Forest Act itself.

Mischief where the damage amounts in value to 50 rupees and more comes under sec. 427; and mischief by fire with intent (or guilty knowledge) of causing damage to the extent of 100 rupees value or upwards is punishable (the imprisonment may extend to seven years, with fine also) under sec. 437. This section would be resorted to in grave cases of mischief by setting fire to a forest.

Mischief to irrigation works, or water-supply works (of any kind and for any purpose) and mischief to roads, bridges, navigable channels, come under secs. 430–1, and mischief to cattle (according to value) under secs. 428–9.

[1] See p. 121. In that case the inference may be (according to the precise circumstances) that he himself *stole* it, and not necessarily that *some one else stole* it and he *received* it. This is also the French law (that any one found in illicit possession of newly-cut wood is presumed to have cut it). Chausson, II, 421; see also Mayne's I. P. Code (9th ed.), page 311 and page 335. I laid emphasis on *recent* possession above, because if it was only after the lapse of a considerable time that the property was discovered, there would be so much ground for probability of previous transfer and so forth, that the inference (if any at all was justifiable) would be of "receiving." On this subject, section 114 of the Evidence Act may usefully be referred to; the principle on which the rule proceeds is, that it is right to presume what is likely to have happened, regard being had to the course of natural events, human conduct, &c., in relation to the facts of the case.

*Criminal trespass* may be just mentioned, but it is not likely to be applied to forest cases, because the specific acts of trespass on forest property are provided against in the Forest Act. As to trespass under the Code and the criminal intention which is necessary to constitute the offence (see p. 122).[1]

The subject of "Attempts" has been dealt with already (p. 131). I need here only remind you that it is only an offence *punishable under* the *Indian Penal Code*, the attempt to commit which, is punishable. "Attempts," therefore, in the case of lesser forest trespass and mischief could not be prosecuted. It is only where an offence connected with the forest or with timber in transit is serious, *and would be punishable under the Indian Penal Code*, that a case of "attempt" could be successfully prosecuted.[2]

"Abetment" may occur in forest cases, because the Indian Penal Code (sec. 108) speaks of abetment of an "offence," and the term here is explained (by sec. 40 of the Code) to include all offences, whether punishable under the Code or under a special law, and irrespective of the amount of sentence to which they are liable. As a matter of practice, abetment would not be taken notice of in merely petty cases. It is immaterial to the *existence* of the offence of abetment whether the principal offence is actually committed in consequence of the abetment or not (I. P. C., sec. 108, explanation II.), but this result *is very material* to the question of amount of punishment. The circumstances which constitute an "abetment" punishable under the Code have been described (p. 127).

We have spoken already of the duty laid on certain persons to give information of offences or render assistance in forest fires, &c. (see p. 399). Omission to render the assistance required (secs. 44, 78, Indian F. Act) would be prosecuted under sec. 187.[3]

[1] As it may be convenient in connection with the award of compensation, &c., to know something of the *Civil* law of trespass, I have added in Appendix B, a brief note on the subject.

[2] Attempts are in the French law punished as the crime itself, but no attempt is recognized as punishable if it is an attempt at a *délit* (a forest offence, for example, not coming under the penal law as a *crime*) unless some special law declares the attempt penal (*Curasson*, II, 429).

[3] If the "assistance" related to the prevention of an *offence*, it must be an offence of the more serious kind (by definition sec. 40 I. P. C.).

A person legally bound, and intentionally omitting to give *information*, would be punishable under sec. 176, I. P. Code. He would come under sec. 177 if the *information* given were such as he knew, or had reason to believe, were *false*.

In the case of the duty imposed by sec. 78 of the F. Act, no penalty was mentioned, because the moment the duty is legally declared, the General Criminal Law provision against the breach of such a duty applies. Secs. 176, 177 refer to information legally required on any subject, or to information about an *intention to commit* some offence, or to giving false information (which is merely another form of the same dereliction of duty). Secs. 202, 203 refer, similarly, to the case of information about an offence *actually committed*. The I. P. Code has introduced a difference in these sections, as to the meaning of the term "offence." Thus, in sec. 176 "offence" means one under the I. P. Code, or under a special law if punishable with six months' imprisonment and upwards, and so in sec. 177 and sec. 202. In sec. 203 it is *any* offence. If, therefore, a case of omission to inform about an *intention to commit* an offence were prosecuted, the first clause of sec. 176 would alone be applicable, unless the offence were of the graver description, when the 2nd clause could also be applied. If the information not given related to an offence actually committed (sec. 202), the same remark holds good.

Under sec. 201, I. P. Code, if *any* person, knowing, or having reason to believe, that an offence under the Indian Penal Code (or may be under the Forest law if punishable with six months' imprisonment or more) has been committed, *causes any evidence to disappear*, or gives false information, *in order to screen* the offender, he is liable to punishment, which varies according to the gravity of the offence concealed (see also sec. 206).

Of the offences under the Indian Penal Code, *indirectly* connected with forest administration, *i.e.*, likely to occur or to come within the range of a Forest Officer's practice as such, I may now mention the principal.

An "unlawful assembly" may possibly occur in connection with some disputed boundary or question of right in land. All that is necessary on the subject has been said at p. 109. And it may be necessary to refer to the *Criminal Procedure Code*,

Chap. IX., as to the action of the magistrate in dispersing an unlawful assembly; and to Chap. XII. as to action taken to maintain existing possession and prevent a "riot."

Giving *false evidence* (secs. 191 to 195) is an offence which is unfortunately likely to occur in forest cases; but inasmuch as on such an occurrence in a forest trial, the Magistrate or Court would take action, it is only necessary to refer the Forest Officer to the sections of the Code (p. 112).

The harbouring or concealing[1] offenders, as a step calculated to defeat the ends of public justice, is an offence under the I. P. Code, sec. 212. The "offender" must, however, have committed, or been charged with, an offence under the Indian Penal Code, or under any special law punishable with imprisonment for six months or upwards.

As regards *breach of trust* (sec. 405), a case under this head sometimes occurs, when a contractor has been employed in the forest to saw up the trees felled, and launch them in certain scantling forms, into the river. It may happen that it pays him well to remove the lighter scantling which is conveniently situated, but larger pieces at a distance from the river may be expensive and troublesome to move. He is then tempted to conceal, burn, or otherwise destroy this timber, so as to avoid the duty of launching it. Here, it will be observed, the offender does not convert the timber to his own use (sec. 405), but he does offend against the further clause of the same section, namely, he violates the express or implied terms of the contract[2] under which the timber was made over to his charge. He can then be prosecuted for breach of trust, to say nothing of a further charge of mischief.

These, I think, will be found to be the principal offences likely to come up in the course of a Forest Officer's business, which will require reference to the Penal Code. I ought, perhaps, more specifically to have alluded to sec. 409, as applicable in case a clerk or a forest subordinate make away with cash or property of Government. But this subject, I think, will be

[1] Husband and wife can *never* be charged with "harbouring" one the other.

[2] A person commits a breach of trust when he violates—

(*a*) any direction of the law,—

(*b*) any express legal contract,—

(*c*) any implied legal contract;—

as to how he is to discharge his trust. (See section 405.)

sufficiently understood from the remarks on the subject of theft (p. 120, see also p. 111).

Certain offences *by* Forest Officers, are more appropriately reserved to the chapter on Forest Officers and their duty.

*Penalties for Forest Offences.*

It remains for us to notice the punishments provided for forest offences, which include some of a special kind. The two primary penalties are "imprisonment" or "fine" or both. The Acts speak merely of fine and imprisonment, because the nature and extent of them are matters of the general Criminal and the Criminal Procedure Law (p. 133).

The "imprisonment" awarded may be either "rigorous" (*i.e.*, with hard labour) or "simple" (*i.e.*, without hard labour) in the Court's discretion, according to the nature of the offence and the circumstances and character of the offender. With the exception of the grave offences declared in sec. 62, the limit of imprisonment under the Forest Act is six months, and for breach of general Rules (sec. 76) where no special penalty is appointed, one month, with or without fine. In the case of Rules about timber (sec. 42, Burma 41) the penalty may be doubled under certain circumstances.

"Solitary confinement" cannot be awarded in any sentence under the Forest Act, but can be ordered, if the trial has been on a charge under the Indian Penal Code, and the sentence is one of *rigorous* imprisonment (see p. 133).

Sec. 62 of the Forest Act is the only one in which fine is mentioned without any limit; and that means that there is no legally fixed amount, but (by sec. 63, I. P. C.) the fine must not be "excessive," with reference to the means or position of the offender and the circumstances of the case. Under all other sections of the Forest Act, 500 rupees is the maximum limit of fine. In the Burma Act, offences in the Reserved Forest are further limited: for they are classified into two sets: the first are the pettier cases punishable only to a limit of 50 rupees (or 100 if the damage done by the offence exceeds an estimated value of 25 rupees), the second are punishable as in the Indian Act (up to six months' imprisonment or fine to 500 rupees or both).

As regards the entire penalty it will be observed that in the case of offences against sec. 25, the general limits are stated, and it is in the magistrate's discretion to award for each case such penalty (within the limits) as he thinks suitable; and so with rules under sec. 32 (Indian Act). In the case of Rules under sec. 37 (Protection of Natural Produce) of the Burma Act, as also in the case of Rules under the Indian Act (sec. 42, Burma 44) and sec. 51, the rules themselves are to provide the appropriate penalties within the general *maximum*. I am not aware of any great advantage of this difference, except that perhaps in the case of offences against the *transit* rules, there is more room for variety in the degree of guilt, or mischievousness of the act punished, and so experienced persons drawing up the rules, could discriminate better.

As to the general question of offences *aggravated* by repetition or by certain accompaniments, and their consequent heavier penalty (see p. 134).[1] There may be *aggravation* which alters

[1] The Bavarian Forest Law of 1852 (Art. 58) admits of aggravating circumstances, and gives a very instructive list. I may advise the Forest Officer in India to study them, because it must be remembered that although our law usually treats aggravation as an element constituting a separate or special offence, and does not leave it (ordinarily) to be a general additional circumstance enhancing the ordinary punishment, yet there is always a wide discretion left to the Magistrate trying the case, whether he will award the maximum sentence or one much less. Hence "aggravating circumstances," such as in the nature of things may be adduced in evidence to establish the greater criminality of the offence and so affect the amount of sentence, should be proved in criminal trials when they exist.

The Bavarian Law enumerates the aggravating circumstances thus :—

(*a*) Offence during the *night* (before sunrise or after sunset).

(*b*) On Sunday or legal holiday; because then the absence of the means of prevention or detection of the offence is more to be counted on.

(*c*) Offender provided with devices to prevent his recognition (*e.g.*, thief with crape over his face, &c.).

(*d*) Offender armed with fire-arms.

(*e*) Cases where the cutting or removal of forest produce is effected by means which increase the damage; *e.g.*, hacking a branch or a stem with an axe instead of a saw; not only cutting the stem but grubbing out the roots, so that the tree cannot coppice.

(*f*) The offender runs away after being called on to stand and give himself up.

(*g*) Refuses his name and residence or gives a false one.

(*h*) Taking away objects which have been lawfully seized or sequestrated. (This would be a special offence by itself in India; not a circumstance subordinate to another act.)

(*i*) Offender has continued the offence after being warned against it.

(*j*) The offender is a right-holder, or a forest-labourer, or employed as a wood-cutter in the forest.

(If he was actually a public servant or Forest Officer, and committed an offence, of course there would be a special and exemplary penalty: here the offender is not actually a Forest Officer, but is in such a position as to make it an aggravating circumstance if he is concerned in an offence.)

the nature of the offence or brings it under a new section; but there is also a *general* aggravation, by which I mean, that while the legal offence in itself is not altered yet the circumstances make it a very bad case of its kind. An aggravated offence in this sense, is dealt with by inflicting the maximum penalty or (as I have said) by bringing a charge under the Penal Code—which usually awards a higher penalty.

I will only repeat here that whipping (Act VI. of 1864) is not applicable to *any* case prosecuted under the Forest Act, and only in certain cases under the I. P. Code (p. 134). And though ordinarily whipping (in the way of school discipline) is awardable as an alternative punishment for juvenile offenders, that is the case of an offence which is proved under the I. P. Code, and not under the Forest Act.

But besides these ordinary penalties of fine and imprisonment for breaches of the law, certain other punitive measures adopted by the Forest law have to be considered; these are:—

(1) The suspension of rights in certain cases.
(2) The order to pay *compensation*; not *out* of the fine (which is an ordinary provision of the Criminal Procedure Code) but in addition.
(3) Confiscation of carts, boats, tools, &c., used in connection with forest (or timber) offences.
(4) Proceedings which are not for confiscation, but are held in a similar manner, with regard to recovering timber or produce unlawfully appropriated.

(*k*) If the theft of wood or other produce involved the cutting out or removal of some property-mark already on the material.
(*l*) When the offence is committed within a year of a previous conviction for the same (or a greater) offence.
(*m*) When there was an intention of doing injury to the forest growth beyond the mere act of appropriation of the particular wood or produce stolen.
(This intent may be presumed when the wood cut or produce removed is useless to the offender, or is in such quantity or of such a kind that a person in his station of life could not be under any temptation to take it for its own sake.)
The French Forest Law (Code F., Art. 201) recognizes as aggravating circumstances—
(*a*) "Récidive," *i.e.*, a second conviction for any *delict* or contravention against the Forest law, within 12 months of a previous conviction.
(*b*) When the offence was by night; or when a tree has been *sawn* down. (*Usage de la scie pour couper les arbres a pied.*)
The penalty is doubled in these cases.
(The use of the saw makes no noise, hence it is an offence concealed; also the use of the saw in a coppice wood may be detrimental to the reproduction.)

And under this head also I may most conveniently bring the special provisions by which the ordinary law of cattle-trespass is applied to the forest, with certain modifications.

Some remarks will be necessary under each of these heads seriatim.

(1) The last clause of sec. 25 provides that when (in a Reserved Forest) a fire is caused—

(*a*) Wilfully, or,

(*b*) By gross negligence,

the Local Government (notwithstanding that any penalty *has been inflicted under this section*)[1] may direct that in such forest or any portion of it, the exercise of *all* rights of pasture, or to forest produce, shall be *suspended* for such period as it thinks fit.

It may perhaps be necessary to point out that the object of this is not so much to *enhance* the punishment as to give the forest a better chance of recovery; and the exact time of suspension, and extent and kinds of rights suspended, will naturally be regulated with this object in view. Nor can it be said that the provision is in effect punishing the innocent with the guilty; for the suspension of rights—where perhaps the right-holders had nothing to do with the fire—is only what would naturally happen if any *calamity* occurred which *incapacitated* the forest from supplying the rights.

And I need hardly remark, that practically and in most cases, the right-holders would have been concerned in causing the fire: but even if it were not so, the rights of innocent parties would only be suspended as far as necessary: *e.g.* rights not retarding the recovery of the forest would be allowed, *e.g.* grass cutting permitted instead of grazing, &c. The value of such a prohibition as a *preventive* is so great, that really this consideration outweighs any hardship. If such a remedy is applied once, it has rarely to be resorted to a second time, anywhere in the district. I have known a case where forest fires were quite put a stop to by the judicious use of an order of this kind (under the old Hill-Forest Rules of the Panjáb).

(2) It is only necessary to say that in the case of Reserved

[1] This would seem as if the provision would not apply if the penalty was inflicted (as it would very likely be in such a grave case) under the I. P. Code; but I submit (until this matter is definitely ruled in the courts) that this would be against the spirit and intent of the provision.

Forests only, *i.e.*, in cases under sec. 25 of the Act, besides the penalty for the offence, there may be an award of "such *compensation* for damage done to the forest as the convicting Court may direct to be paid."[1] This provision is therefore formally (at any rate) distinct from that in the Criminal Procedure Code (Act X. of 1882) sec. 545; since under that section, in the cases therein provided, the Court can order the *whole* or *part of the fine* inflicted (and can therefore adjust the amount of the fine suitably) to be paid to the person injured (see p. 173).

The provision of the Criminal Procedure Code is, however, itself applicable, in *any* case, whether under the Forest Acts or the Code.

(3) and (4) The subject of confiscation—3rd and 4th heads above noted—is dealt with in secs. 50-60 of the Forest Act (B. *id.*). As I have already remarked, not only is *confiscation properly so called*, treated of as a penalty,[2] *but also* the case where property connected with, and probably obtained by, the commission of an offence, is either produced at the trial along with the offender, or is discovered lying in the forest or elsewhere, the actual offender who cut or prepared it for removal not being known or arrested—or having taken to flight.

It is obvious that in these latter cases there is nothing in the nature of *confiscation* properly so called. The property never belonged to the wrong-doer in whose hands it was seized, nor to the person (whoever he might be) who cut it and left it lying.

But the procedure is the same in both cases, or, at all events, is closely analogous.

Where any forest produce appears to have been the subject of an offence punishable under the Forest Act or I. P. Code, the first thing to be done is to make a formal "seizure" which may (sec. 52) be effected by any Forest or Police Officer. The fact of seizure is indicated by putting *a mark* (sec. 52,—usually the "broad arrow"), and a report has at once to be made to the Magistrate who would have jurisdiction to try the offence.

[1] By this is meant, compensation in money. I am doubtful whether the Court could allow a prisoner to offer so many days' labour in the forest instead of having to pay money: there would be some advantages in such an arrangement.

[2] The French law is similar. Seizure may be made of all cattle, tools, carts, &c., "*trouves en délit*" (C. F., 161), and all illicitly-obtained produce may be ordered to be restored (*restitué*), for there is no real confiscation in such cases (C. F., 198): tools of all kinds can be confiscated, but not animals nor carts.

If there is an offender connected with the case, and he is not arrested on the spot, the Magistrate will take the necessary steps for his arrest and trial. At the close of the trial, if the property appears to be Government property, the Magistrate will order its restoration, and the Forest Officer will take charge (sec. 55), or he may order any other disposal that he thinks right;[1] and if the property belonged to the offender, the Magistrate may order its confiscation, in addition to any other penalty, under sec. 54. If there is no offender, or none can be found, the Magistrate enquires into the cause of seizure, and if he finds that the property has been obtained by the commission of a forest offence, he can order its restoration, or order its delivery to any person he deems entitled to it.[2]

But it will often happen that though the actual offender is not traced,[3] some person is known or believed to be concerned with or interested in, the produce seized, then notice should be issued to such person, or a general public notice issued and one month's delay allowed, during which any person may be heard, and may offer evidence, against the seizure: no order is passed till the month has expired (sec. 56).

If the property is such that will not keep or will deteriorate,

[1] See also under the Criminal Procedure Code, sec. 517. Here also, it is not necessary that the accused should be convicted. As long as *any* offence appears *to have been* committed with regard to the property produced, the court may pass orders for its disposal. The section only speaks of property produced before the Court. And the property need not be in the original state in which it was before the offence; the property dealt with may be the result of melting up, fashioning or altering the original.

The procedure in sec. 51 of the Forest Act and sec. 523 of the Criminal Procedure Code are very similar. But there are so many peculiarities in forest cases, that it is better to provide specifically for the subject in the Forest Act.

[2] In these cases, of course, it is difficult to say who is the real owner, because there is an apparent offence but none as yet proved. The Forest Act, therefore, facilitates the enquiry by laying down that where wood is seized in this way, the Court shall start with a presumption that the wood belongs to Government: then any one else who (as will afterwards be stated) is found to object to this seizure is properly put to prove his title against that *primâ facie* presumption. (F. Act, sec. 68, B. 67.)

[3] In the Burma timber frauds in 1872, large quantities of teak logs were found in the forests, obtained fraudulently under colour of a permit or lease to cut certain teak trees. No one was put in charge, nor could it in all cases be ascertained who actually cut them. But it is believed or known that a Company, the holder of the permits, was interested in the timber; consequently, a notice was issued to them on the seizure of the timber, to show cause why it should not be made over to the Government Officers. In those days the Act of 1865 was in force, under which all such proceedings were spoken of as "confiscation." It is obvious, however, that in such a case there was no confiscation, as the property was in fact stolen from Government and never was lawfully the property of the Company at all.

it may be sold by the Magistrate's order, and the money proceeds will be kept or dealt with in the same way as the property itself (sec. 57).

It is hoped that the student will have fully mastered the distinction between secs. 54, 55, 56.

In actual practice, cases of *confiscation* are not common, for the property must be that of the wrong-doer, only that some offence has been committed in respect of it: for example, he has lawfully obtained 300 poles of teak, but he has smuggled them by a forbidden route, to evade the pass regulations: here the *property* is the offender's lawfully enough; if therefore the property is taken from him as a penalty for the smuggling, that is *confiscation*, properly so called; so if his cart, axes, or cattle were taken, as used in committing the offence; but it is to these cases *only* that sec. 54 applies. Far more commonly, what happens is this, that a person commits an offence, and he is caught, and with him a large quantity of wood, &c., *wrongfully* cut or removed; here, at the close of the trial (sec. 55), the Magistrate will simply *order* the stuff to be given back to the Forest Officer; there is no *confiscation*, because the wood never was the property of the offender at all. It is the same with sec. 56; the Forest Officer may come across a lot of Government timber lying in the forest, for the offender has heard of his approach, and has left it and fled; here of course he may require to have a Magistrate's order to dispose of the property, although no offender is caught;[1] but it is no *confiscation*, only a restoration of the property to Government, from whose possession it was wrongfully removed.

A common case is where, when the property is seized, it is found to be a mixture. For example, a man has a "permit" to collect dry and fallen wood, and to stack it for removal; he nefariously cuts a lot of green wood, and mixes the billets with the dry in the stacks; here, as a forest offence has been committed in respect of some of the wood, it can be seized; the Forest Officer would be justified in at once separating the green from the dry and seizing the green; or, if he could not make the

[1] The Magistrate's order (issued after notice as above mentioned) would prevent any complication arising by *third* parties claiming rights in the property, as where the offender was only a servant.

separation, he might fairly seize the whole.[1] But it will be clear that in regard to such stacks no order of *confiscation* is passed. Sec. 54 does not apply; sec. 55 does. The trial being over, the Magistrate would simply pass an order that the green wood was to be restored to Government, and the dry given back to the accused. The dry wood could not be *confiscated*, it will be observed, for no offence has been committed in respect of *it*. It was lawfully enough obtained, and never would have been seized at all, but that it was mixed with other stuff that *was* liable to seizure. The green wood would also not be the subject of *confiscation*, for it has never become the property of the thief, and can only be *restored* to Government. In such cases the only order that can be legally passed would be at the close of the trial (1) to separate the material, restoring each kind to each person; (2) to sell the whole and allot a fair value out of the proceeds to the parties.[2]

From any order of disposal after trial, or disposal where no offender has been found, there is an appeal, either on the part of the Forest Department, or of the offender, or person interested in the property seized (sec. 58). One month is allowed for the appeal.

In the case of confiscated material after the appeal has been heard, or after the period of appeal has elapsed, the property vests, absolutely and free of incumbrances, in the Government (sec. 59).

Under sec. 60, the Local Government may empower any officer to direct the immediate release of property seized. This will enable errors to be corrected at once without putting the person interested to the trouble and expense of a trial or appeal.[3]

[1] No doubt it will be convenient that the Act should be amended so as to specify this case; but I think even now, on general principles of justice, the Courts would so decide. If a thief, by his own wrongful act, so mixes up what is his own with what is stolen, he certainly could not complain if the whole were seized, and even in the end the Magistrate would be justified in restoring the whole lot to the Forest Officer, unless the prisoner could prove what was his, and there was some special equitable way of adjusting the respective value of the part that was not stolen, as, for example, if the stolen wood were only a small part of the entire heap.

[2] And naturally, the value of the wood restored to prisoner could be attached by the Court in liquidation of any fine or compensation ordered to be paid.

[3] In the North-Western Provinces, Government has empowered all Conservators and Deputy Conservators to exercise this power; but this was hardly intended, for it is obvious that if a subordinate made a seizure, and his official superiors thought the seizure unnecessary or undesirable, they could order its release and refuse to proceed, in the ordinary course of their official duty as controlling

This power, coupled with the liability of Police and Forest Officers to be prosecuted for "vexatious or unnecessary" seizures, are ample safeguards against any abuse of the powers given by this Chapter, which otherwise are obviously necessary for the safety of Government and other forest property.

### *Cattle Trespass.*

The subject of *Cattle trespass* is another instance of a class of injuries specially dealt with by the Forest Act, though reference is still made to the ordinary Cattle Trespass Act. Some observations on these provisions are necessary.

Cattle-trespass is an offence, but one in which human agency is only indirectly concerned. If there is a responsible person in charge of the cattle (and this is the reason why, under the head of grazing regulations, I stated the necessity for such a person being appointed) he is answerable to keep the cattle from mischief, and from straying where they ought not. If he is guilty of negligence or misconduct in this respect, he is liable under sec. 25 (*d*) or 32 (*g* or *h*), as the case may be. But the cattle themselves may be pounded when trespassing on any permanent (reserved) forest estate, or in a closed portion of a Protected Forest (sec. 69).

It was necessary for the Forest Act to specify this, because the general "Cattle Trespass Act" (I. of 1871) speaks only of "public plantations," which is not sufficient for forest protection generally.

Another addition to the Act of 1871 was also necessary with reference to forest protection. The fines imposed under that Act may often prove unsuited. For in forests, the object is not to graduate the scale of fines solely according to the value of the cattle, but according to the amount of mischief they do in the forest. It is true that the value must *also* be taken into account, otherwise, considering only the damage, the pound-fee

officers, without any special power. What is meant is, that the Commissioner or other such superior Civil or Police authority should be vested with power to summarily interfere and stop the proceedings if he thought the seizure unwarrantable.

It is in connection with these proceedings that under section 61, a Police Officer or Forest Officer is threatened with punishment for a vexatious or altogether unnecessary seizure.

might exceed the total value of the animal. The Forest Act then prescribes a scale of fees on this principle, which the Local Government may order to be enforced. For elephants, buffaloes, and camels the fee is heavy, as is the damage done by such animals; and although goats are, as we have seen, far more injurious to a forest than horned cattle, still the small value that they have, makes a fine of eight annas quite heavy enough, all things considered.[1]

It will be observed that these *higher rates* are not necessarily in force in all forests, although in *all* forests cattle are liable to be pounded under Act I. of 1871, because, as I said, that Act is, in any case, declared to apply. A special order of Government must be issued in order to make the higher scale of fees leviable.[2]

In all cases the procedure of Act I. of 1871, for the establishment of pounds, the disposal of animals pounded, and so forth, are unaffected, so that it will be desirable for me to call attention to those parts of the Act which are practically of importance to the Forest Officer.

By sec. 4, "pounds" (enclosed places in which cattle seized for trespass are detained) may be established at such *places* as the *Magistrate of the district* (subject to the general control of the Local Government) may from time to time direct.

Forest Officers should therefore apply to the Magistrate of the district when they wish to see a pound established in any place, and should furnish him fully with the information, which will convince him that a pound is desirable, and that it will pay its expenses.

The pound (even if established in a plantation or forest) is under the control of the Magistrate (sec. 5), and he fixes the scale of charges for feeding and watering the cattle detained, which, of course, are payable beside the punitive pound-fee or penalty for the trespass.

[1] The Bavarian law, for the purposes of penalty (Art. 87), puts goats, horses, and horned cattle together, and sheep and pigs separately. The latter are subject to a higher penalty if the trespass occurs during the time of the fall of the beech-mast (because greater damage is then done, the crop of possible seedlings being prevented or diminished in extent). If the trespass occurs in a "closed" place, the penalty is double. This is an excellent rule.

[2] There are cases in which the grazing in a plantation or forest (especially when artificial irrigation has been used or the soil is "sailába") is so good that the people gladly let the cattle go to pound and pay the fees. Here would be a good case for ordering the higher scale.

The Magistrate also appoints the "pound-keeper" (sec. 6.) This "pound-keeper" is a public servant. It is his duty (sec. 7) to keep a register and to enter therein the number and description of cattle, the time of their being brought in, the name and residence of the seizer and that of the cattle owner if known. The person seizing the cattle, is entitled, if he wants it, to a copy of the entry.

All officers of the police are bound, when their aid is requested, to aid the seizer in preventing resistance to the taking, or the rescue, of the cattle (sec. 10).

The fines *ordinarily* levied are specified in sec. 12, and I may repeat that these (as regards forests) are in force always, unless a special order has been issued providing for the higher fees under the Forest Act.

When the owner claims the cattle, they are given up to him on payment of the fine and the cost of feeding (sec. 13).

If the owner appears, and disputes the legality of the seizure, he must deposit the fine and charges, and get back his cattle, the money being in deposit pending the hearing of his case (sec. 15: see also secs. 20–23).

If no one claim within seven days, the pound-keeper informs the officer in charge of the nearest police station, who puts up a notice at his office, and causes the same to be publicly proclaimed; and if within seven days from the date of this again, the cattle still remain unclaimed, they are sold by public auction (sec. 14).

In any case, if the fine and charges are not paid (either by refusal or omission), or are not deposited (by an owner intending to contest the seizure), the cattle may be sold. The fine and charges will be deducted from the sale proceeds, and the balance made over to the owner: it may not, of course, be necessary to sell all the cattle; so many only will be put up as are likely to realise the sum required; the remaining cattle are then restored.

A written memo. of account is also given to the owner in such cases, showing the number of cattle seized, the amount of fine and charges due, the number of cattle sold, the price realised, and the manner in which this was disposed of (sec. 16).

Fines recovered from cattle pounded, are credited to the Magistrate of the district (secs. 17–18), who has a "pound fund" from which the salary of the keeper and cost of the pound

are defrayed. If the fund has an available balance after these charges are met, the money may be devoted to certain useful objects stated in the Act. The Forest Department does not, as is sometimes supposed, get the fees derived from forest pounds.

When there is a surplus after sale of cattle, and no one claims it, it is kept in deposit for three months, after which it also is finally credited to the "pound fund."

The Act prohibits pound-keepers and police officers (and Forest Officers should be required to obey the same rule) from purchasing directly or indirectly, any cattle sold by auction under this Act (sec. 19).

It should be remarked that cattle ought not to be seized for trespass, nor a herdsman or driver prosecuted, when the cattle have got into a forest by accident, or notwithstanding reasonable efforts to prevent it, nor when they have taken refuge there from a storm.[1]

The Hazára Regulation (II. of 1879), sec. 31, contains a provision that if cattle stray off a lawfully used road, without negligence on the part of the driver, they are not liable.[2]

The Act also provides (secs. 24–28) penalties for *forcible opposition to seizure* of cattle liable to be pounded, and for *rescue* of such cattle.

It is provided under the Indian Penal Code that *mischief* may be committed (sec. 425, illustration *h*), by causing cattle to enter on a field, &c., with the intention of causing damage to crops, &c., or knowing it to be likely that such damage will be caused. When a fine is imposed in such a case, the Cattle Trespass Act provides (sec. 25), that the fine may be specially recovered by sale of all or any of the cattle by which the trespass was committed, whether seized in the act, and whether they were the property of the offender or only in his keeping at the time.

Sec. 26 imposes a special penalty for negligent or intentional damage to "any crop or produce of land" or to a public road, by pigs.

Sec. 27 imposes a penalty for neglect or misfeasance by a pound-keeper; the fine being recovered from his salary.

[1] Compare the Austrian law of 1852, Art. 66; but any damage done must be made good.

[2] There is a similar rule in the Saxon law (Qvenzel, p. 192).

Any fine imposed under secs. 25, 26, or 27 may be applied by the Magistrate in compensation for the loss inflicted.

Nothing in the Act will prevent a civil suit being brought for damages (sec. 29). But if any compensation has been recovered under the Act, the amount of it is set-off against any damages awarded in the civil suit (sec. 30).

## APPENDIX A.

### Abstract of the Chief Continental Laws respecting Forest Fires.

*French law.*

It may be useful to compare with the Indian law, the provisions that have been made by European law against forest fires.

Under the French Code (Article 42), purchasers of the annual cutting,[1] their workmen and agents, are forbidden to light any fires outside their lodges or huts or sheds, under penalty of 10 to 100 francs, besides liability to damages. Burning of charcoal is regulated under Article 38 by written order as to its locality. Article 148 prohibits the kindling of fire (under any pretence whatever) inside a forest or within a distance of 200 *mètres* from it.[2] Lighting a fire contrary to this rule is punishable with fine from 20 to 100 francs. And if a forest fire actually breaks out in consequence, the punishment for mischief by fire under the Penal Code[3] may be inflicted besides damages. Under Article 149 of the Code For., provisions similar to those of the Indian law are enacted compelling right-holders, &c., to help in case of fire; and in case of refusal they may be deprived of their right for at least one year, or at most for five years, besides being liable to punishment under Article 475 of the Penal Code. (This section refers to refusal to help a public servant demanding aid, similar to

[1] The trees to be cut in the forest for the year according to the working plan, are in France, usually sold standing, and the purchaser cuts and removes them, there is a special procedure for the "adjudication" of the "coupe;" and conditions as to the removal, followed by a careful scrutiny on the expiry of the time, to see that all conditions have been duly observed, are laid down.

[2] This refers of course to fires out of doors, not to fires lighted inside a house which happens to be within 200 mètres of a forest boundary (Curasson, II, 18).

[3] By Article 434 of the French Penal Code, a *wilful* incendiary of a *house* or a *forest* may be punished even with death. This of course refers to an atrocious form of crime committed deliberately out of hatred or for motives of vengeance (Curasson, II, 404); but an intentional setting on fire of a forest, even with less criminal motive, would be as severely punished as under the Indian law.

our own Indian Penal Code, sec. 187.) Article 151 prohibits the establishment of lime or plaster of Paris kilns, brick or tile kilns, without special permission, within one kilomètre of the forest, on penalty of a fine of 100 to 500 francs, and the demolition of the structure.

Since this page was in print, a law has been passed in France for the special protection of certain forests in the Dep. des Alpes Maritimes, from fire. Reference must be made to the *Revue des Eaux et Forêts*, Vol. XIX., p. 136.

*German law.*

In Prussia[1] no fire may be lighted inside a forest or in dangerous places, within five "ruthen" (the *ruth* = a pole or $5\frac{1}{2}$ yards) of the forest boundary.

Tobacco smoking off the public and authorised roads, is not allowed in pine forests between 1st April and 1st October. A prohibition also exists[2] against the use of pipes without covers (which prevent burning particles from falling), also against shooting with paper gun-wads which may be smouldering and fall among dry grass. The provisions apply to private as well as public forests. These provisions may be usefully noted for Indian practice.

In Saxony, smoking cigars, and pipes without covers, in forests, is forbidden;[3] and the use of flaming matches, as well as kindling fire in any dangerous place, is forbidden. The police are bound to make these prohibitions generally known by issuing notices, advertising in the local newspapers, &c.

As usual, fire may not be kindled at all, inside a forest, nor in dangerous proximity to it (*in gefahrbringender Nähe*); the law also prohibits the leaving unextinguished of any fire which may have been lawfully kindled.

The assistance of the whole of the residents of the nearest township or village, as well as that of all Forest Officials and those employed under the Game Laws, may be demanded: and persons so called on are to bring spades, axes, ladders, &c., which may be necessary for the work of extinguishing the fire, and may also be called on, after the fire is out, to organise a watch for a time to see that the fire is really out and does not break out again.[4]

The Bavarian law contains generally similar provisions.[5] Fire may not be kindled in a forest nor within 300 Bavarian feet from it, without precautions to prevent it spreading to the forest itself. Forest

[1] *Rönne*, p. 761.
[2] Id., p. 800. See also Eding, p. 172.
[3] Qvenzel, pp. 100–103.
[4] *Dorf Feuer-Ordnung*, Cap. III, § 20 and IV, § 1.
[5] Law of 1852, Art. 45 *et seq.*

Officers have a power similar to that in the Indian Act, of prohibiting the carrying or kindling of fire in any shape, in exceptionally dry weather.

The duty of extinguishing fires when done with, is also imposed.

### *Austrian law.*

The Austrian law[1] forbids lighting fires in the forest or on the borders (*am Rande*). Anyone who sees a fire left burning is bound to put it out. Passengers going along roads, if they see a forest fire, are bound to give information at the nearest house, and the householder is then bound to convey information to the nearest Forest Officer, or if there is none, to the nearest local officials. The officials can demand help as under the Saxon law, and are specially empowered (which is useful) to "take the command" and *issue orders as to what each person is to do* in effecting the suppression of the fire.

### *Italian law.*

The Italian law refers the regulation of all matters connected with protection from fire, to *rules* to be made by the Forest Committees and submitted to the Provincial Council.[2] When these are agreed on, penalties for their breach may be provided by higher authority.

These rules do not contemplate the actual crime of setting fire to the forest; they merely contain protective and general provisions such as those I have been describing. Actual mischief by fire is prosecuted as a criminal offence under the Penal Code. The rules may regulate the kindling of fire, the burning of weeds or stubble in fields, and so forth, on land contiguous to a forest.

They may also regulate the establishment of lime-kilns, brick-kilns, and kilns for tile burning; also the manufacture of pitch, rosin, lampblack, pyroligneous acid (made from wood chips), potash, &c., and all other factories and furnaces for which "a copious consumption of wood may be necessary."[3]

[1] Law of 1852, Arts. 44, 45, 46.

[2] Law of June, 1877, Art. 45.

[3] The construction of *charcoal* pits or kilns (the word used is *aio*, which means a threshing-floor, a barn, or in fact any place of the kind set apart for some special work) and the sheds (*capanne*) for sheltering the workmen are specially mentioned under a separate head.

# APPENDIX B.

## Civil damages for Trespass.

*Note on the Civil Law of Trespass.*

An offence of trespass in a forest will in most cases be amply provided for by the punishment *and* award of compensation under sec. 25 of the Forest Act. There may, however, be exceptional cases in which the civil law of trespass may come into play.

The subject belongs to that branch of law called the Law of Torts, or the law under which remedies are provided by the Civil Court for wrongs to the individual, which are not crimes under the criminal law.

Under the civil law, *any* entry on the land in the occupation or possession of another constitutes a trespass, for which an action for damages is maintainable, unless the act can be justified. This is a very necessary principle, since if it were not so, trespasses might be committed and afterwards pleaded as acts of adverse possession, although nothing had been done but simply entering on the premises.

"If," says Addison,[1] "a man's land is not surrounded by any actual fence, the law encircles it with an imaginary enclosure, to pass which is to break or enter his close. The mere act of breaking through this imaginary boundary constitutes a cause of action, as being a violation of the right of property, although no actual damage may be done. If the entry is made after notice or warning not to trespass, or is a wilful or impertinent intrusion on a man's privacy, or an insulting invasion of his proprietary rights, a very serious cause of action will arise, and exemplary damages will be recoverable: but if there has been no insulting or wilful and persevering trespass, and no actual damage has been done, and no question of title is involved, the damages recoverable may be merely nominal.

"Every trespass upon land is, in legal parlance, an injury to the land, although it consists merely in the act of walking over it, and no damage is done to the soil or grass."

If, therefore, simple trespass, as a menace to proprietary right, is actionable, so also is every act of damage, whether it is cutting grass or trees, removing stones or discharging rubbish on the ground, or

[1] Law of Torts (Caves' 5th edition), p. 330.

letting out water on to the land. And even if the wrong-doer has caused the damage unintentionally, he is still liable if damage actually occurs, unless the damage was beyond his control and he could not help it.

In any case, of course, the damages may be merely nominal; but it is a well-known principle of civil law that wherever there is an actual wrong, as such, there must be a remedy.

The question of actual value of damage done, is often one of difficulty. Take, for instance the case of a forest which, like so many in Burma, consists of a jungle of bamboos with teak scattered about it. As long as those teak trees stand, their seed may fall, and greatly increase the number of valuable trees in the forest, especially under proper management in keeping out fire and cutting the undergrowth so as to encourage the teak. Here, if a man unlawfully cuts out a large proportion of the teak, he not only deprives the Government of the value of the timber but also the reproductive power of the tree. It is somewhat analogous to the case of a wrong-doer who should kill a valuable bull kept for breeding purposes: it would be poor compensation to give the owner the value of the carcase as beef; what he values is the reproductive power which may give a progeny of useful animals.

The question of damages, however, is governed by principles similar to those which prevail under the Contract Law. The damage must be the direct consequence of the wrong, and "remote" or indirectly resulting damages will not be allowed. What is remote or indirect damage, is a question of fact under the circumstances.

In cases in which the wrong-doer has made away with some material, the rule is that the presumption is against the wrong-doer; where a teak tree is cut, if the timber is not forthcoming, it will legally be presumed that the stem was sound and well grown: "*omnia presumuntur contra spoliatorem.*" An instance of this may be cited from the French law, which draws a distinction between the offences of cutting a tree above two decimetres in girth, and cutting one below that size. The girth for the purposes of this distinction is taken at one metre above the ground (Arts. 192–3, Code For.) If the wrong-doer has removed the stem, the measurement of course cannot be taken at one metre, so the measurement is taken at the top of the stool which remains, although this is likely to be unfavourable. But this is on the principle of the presumption against the wrong-doer.

# LECTURE XXVI.

## The Legal organization of the Forest Service.

We now approach the fifth (and last) head of the General topics of Forest Law: (p. 198) which is "the constitution of a Staff of Forest Officers,"—giving them legal powers, and imposing on them certain duties and obligations. It is obviously necessary to have a special staff; for, not to speak of the technical training required for all duties connected with forest management, even the protective duties necessary could not be performed by the ordinary police. The law therefore gives legal existence to officers appointed to carry out the provisions of the Forest Act, and calls them "Forest Officers." Forest Officers of all grades are by law "Public Servants" (see definition in the I. P. Code, and also the Forest Act, Chap. XII.; B. Ch. X.; M. Ch. IX.). They are thus subject to all the provisions of the Penal Code which impose duties and liabilities on, as well as extend a certain protection to, "Public Servants" in general. To these provisions the Forest Act adds certain rules of its own, for special reasons.

It will be convenient to consider the subject of this (and the remaining) Lecture, under the following heads:—

**I. The general nature of public service.**

**II. The appointment of Forest Officers and the organization of their service;**

**III. The special responsibilities of Forest Officers under the Forest and General law;**

**IV. The special protection extended by law to Forest Officers;**

**V. The legal powers of Forest Officers;**

**VI. Offences against the lawful authority of Forest Officers as public servants.**

### (I.) The General Nature of Public Service.

In theory, all public servants are appointed by the Crown; but usually the authority to appoint is delegated. The delegation appears, in more or less general terms, in Statutes or Acts. Sometimes the office is assumed to exist, and the law merely states who is to nominate persons to it, and under what conditions persons can be appointed.[1] Sometimes the office only is created, and the person to hold it is detailed by orders embodied in Departmental Codes or Circular Orders.[2] Very often an office may be created generally by name, and then several sets of powers become attached to it by express provision of different laws. Take for example a Deputy Commissioner in a "Non-Regulation" Province: there are laws which declare that such officers may be appointed generally. But the Deputy Commissioner has *executive* functions determined by Departmental Government Orders; he has *magisterial* functions under the Criminal Procedure Code; and may perhaps have *Civil* powers under the Courts Act of his Province, and the Civil Procedure Code; he has powers under the Land Revenue Act, and he has also various powers connected with Stamps, Excise, Opium, &c., under the laws devoted to these subjects.

In India all appointments not specifically provided for, either in the "Act for the better government of India (21 & 22 Vict. cap. 106) (A.D. 1858), or in some other Statute or Act, are covered by the general section (30) of the Act alluded to, which runs thus:—

"All appointments to offices, commands and employments in India, and all promotions which by law, or under any regulation, usage, or custom, are now made by any authority in India, shall continue to be made in India by the like authority, and subject to the qualifications, conditions, and restrictions now affecting such appointments respectively. But the Secretary of State for India in Council shall have the like power to make regulations for the division and distribution of patronage and power of nomination among the several

[1] For example the Indian Police Act V. of 1861, which specifies the grades, who is to appoint them, what their duties are, and so forth.

[2] It is obvious that this is delegation. The Government of India, for example, make certain rules about appointments, which appear in a Departmental Code. This is expressly or impliedly sanctioned by the Secretary of State, who acts as the representative of the Crown.

authorities in India, and the like power of restoring[1] to their stations, offices or employments, officers and servants suspended or removed by any authority in India, as might have been exercised by the said Court of Directors, &c., if this Act had not been passed."

The staff which is to control and manage the State Forests, is accordingly appointed under executive orders, which appear in the Departmental Code.[2] In this case also it is clear that all the different appointing authorities are really exercising their powers by delegation from the Crown, under the general powers given in the "Act for the better Government of India," already alluded to. The Conservator is empowered, for example, to appoint a Forester: but this power is delegated to him by the Governor-General who has made the Code, who again derives his authority from the Crown, through the Secretary of State in Council.

The Forest Act neither creates the different classes of Forest Officers recognized by official titles, nor says who is to fill these different offices. It takes for granted that the proper authorities will have appointed "Forest Officers" in a known or customary order and gradation, and contents itself with assigning powers and duties either to all Forest Officers generally, or to "*the* Forest Officer," as will presently be explained.

I may take occasion to mention, that in general, a public servant acting in the office to which he is appointed is presumed to have been properly appointed, the order of appointment (*Gazette*, &c.) need not be proved (Ev. Act, 1872, sec. 91, exception 1).

The powers given to, and duties required of, public servants by Acts of the Legislature, are those *legal* powers and duties, which affect legal rights and impose penalties, and which are not therefore to be conferred by executive order. Powers that may affect the property or the liberty of third persons, must always

[1] Hence the admission of appeals against orders of dismissal, &c., to the Secretary of State.

[2] Conservators, Deputy Conservators and Assistant Conservators are appointed by the Government of India. Sub-Assistant Conservators and Probationers for the grade, are appointed by the Local Government or by the Government of India according to the legal nationality of the candidate. Conservators appoint Forest Rangers, who form the executive staff, and also Foresters and Forest Guards who form the protective staff. Guards also are usually nominated by the Divisional controlling officer. (There may, of course, have been detailed alterations in the Code & orders of which I have not information.)

be given by public authority of the law. Duties which have a similar effect, either as regards the legal obligation of the officer himself, or on the position of third parties, should also be so prescribed; especially those duties, the neglect or misfeasance of which entails a criminal responsibility or the liability to a civil suit for damages. But there are many other duties which merely affect the Government as employer, and public servant as the employed: there are also many terms and conditions of service which affect no one, to any appreciable extent, besides these two parties. Such duties and conditions are usually not (though the Continental laws, as we shall see, do not always restrict themselves to the same limits) specified in any penal or even civil law, but are left to Departmental Code, "Circular Orders," and other methods of conveying Official orders with which every one is familiar. It is always held advisable by our Legislature, never to make special provisions of *law*, still less of law carrying a penalty of a criminal or *quasi* criminal character,[1] where the matter can be adjusted on the ordinary principles of the general law of *contract*.

Consequently the Forest Officer will perceive that, while some of his powers are given him by the Forest law and others by the General Criminal law, and while he is by law prohibited from doing certain things, and in a few cases threatened with criminal penalties, in the greater part of his official duty he is subject only to departmental or general official rules and obligations, which may entail fine, censure, or dismissal (according to his rank and circumstances), and which *derive their force from the law of contract*. Just as in the case of the duration of his service, so it is in these matters. If he is what is called a "Covenanted" officer, he will probably have put his name to express clauses binding him to obey the rules and orders of his service, heretofore made, or hereafter to be made, by competent authority. But even if he has not signed a covenant, he is nevertheless held, on obvious principles of general law, in accepting service with Government in any grade or rank, to enter into an *implied contract* to accept the rules as to salary or remuneration, terms of service, and rules of leave and pension, issued by

[1] This will receive a general illustration when I come to speak of the special rules about appointment of Forest Officers and compare them with the Police Force.

authority, as well as to render obedience to superiors. He contracts to accept and abide by all service prohibitions, and to fulfil all duties as to inspection, work, keeping accounts, and all other matters whatsoever, which find place in the Departmental Codes and Circular Orders, or are within the power of his superior officers (according to the rules of service) to prescribe.[1]

It may be that a difference, which at best is more formal than real, exists between private contracts of service and public. In private service the terms are expressed at the outset, and cannot afterwards be varied without the consent of the employé. But with Government service it is understood that the welfare of the Department, and of the Public generally, may demand that rules should be modified and new rules made, so that the service may be as efficient as possible, and the public advantage, in the proper conduct of public business, secured. But in the former case there *may be*, and in the latter always *is*, an express or implied agreement to accept any alterations in terms that may be necessary. Such changes never of course amount to any absolute or legal injustice constituting a breach of contract (as *e.g.*, if Government were suddenly to require all its servants to work without salary). And I may here add that Government always recognises the duty of making known, by the due publication of circulars, &c., any such terms of service, or alterations in them. I apprehend that a public servant would have a good case, if he were dismissed for breach of a particular rule, and he could show that he was unaware, and *had no means of becoming* aware, of the rule.

As regards the *duration* of public service, this is sometimes fixed by law, sometimes by executive rule, and sometimes by specific contract.

For example, the Judges of the Superior Courts in England are by the Constitution appointed "*quamdiu se bene gesserit*"—as long as they conduct themselves uprightly and properly; they cannot be removed at the mere will and pleasure of the Sovereign. But as the condition of "good conduct" is open to doubt, it is constitutionally

[1] It will be observed therefore that the force of a Departmental Code, like that of the Forest Department, is not a "force of law" like the Forest Act or rules made under it; but it consists of rules of service which Forest Officers by their *contract* of service *are bound* to obey.

held to mean that the Judge shall only be deprived on his being guilty of such misconduct as will induce *both Houses of Parliament* to present an address to the throne praying for his removal.

Contract often has an important bearing on the duration of service. Many officers are appointed by formally entering into a *covenant* with the Secretary of State or other authority, by which their services are engaged for a fixed time, or for an initial term of years, after which the covenantor becomes subject to certain departmental rules about continuing in service up to a certain *age*, or for a certain term of years, after which retirement on pension is compulsory, and so forth.

Where there is no such agreement, appointments are always during the pleasure of Government. In the case of superior service, there are always departmental rules, which contain or imply specific terms regarding the duration of service; and in the case of all inferior appointments not so regulated, the service would be terminable by notice, or by payment of a month's or a quarter's or a year's salary (according to the usual terms), just as any private service might be.

### (II.) The appointment of Forest Officers and organisation of the service.

In the Forest Acts, as I said before, no titles or grades of Forest Officers are specifically provided. The different official designations, and the gradations of rank and pay, the age and qualifications of nominees, and so forth, are executive matters and are prescribed by authority of Government in the Forest Department Code.[1] The Act only speaks of "Forest Officers" generally; and this term is defined to include any person (by whatsoever designation called) whom the Governor-General in Council[2] or the Local Government (or any officer to whom the power of appointment is delegated by either), appoints by name or '*ex-officio*,' to do anything required by the Act (or rules made under it) to be done by a Forest Officer.

[1] See note on p. 453 as to the force of this Code, consisting of (executive) Departmental rules and orders.

[2] Officers nominated at home by the Secretary of State, for Forest service, are nevertheless formally appointed Assistant Conservators, &c., by the Governor-General in Council, on arrival in India.

This might at first sight give rise to a doubt, because the authorities mentioned do not, apparently, appoint officers in this way. A *Gazette* or other order of appointment, merely states that so and so is appointed to be a Conservator, a Deputy Conservator, an Assistant Conservator, or Sub-Assistant Conservator of Forests, or a Forest Ranger, Forester, or Forest Guard; and is posted to such and such a Province, in charge of such and such a Forest Division in the Province. But the order so framed is to be read in connection with the Rules and Notifications made pursuant to the Forest Act, on the subject of powers.

In the Indian Act, it will be observed that mention is made, throughout, (1) of *a* (or *any*) Forest Officer, and (2), of *the* Forest Officer, and (3), of a Forest Officer *specially appointed*. In the *first* case there can be no doubt all Forest Officers of whatever grade, can act (and if any subsidiary Rule limits the powers, it will be explicit). The *third* case also leaves no doubt; but the *second* refers to the proper officer, *i.e.*, to the particular grade of officer to be specified in rules.[1]

The Burma Act has adopted another method: it defines "Forest Officer" to mean all persons appointed (by certain authorities stated) to be Conservators, Deputy Conservators, Assistant Conservators, &c., &c., or to discharge any function of a Forest Officer under the Act or rules. (This latter addition includes the case of Civil Officers appointed to do certain acts in places where a regular forest staff has not yet been constituted.) In consequence of this definition, the Act throughout prescribes everything to be done either by "a" or "any" Forest Officer, or by "a Forest Officer specially empowered." All that is neces-

[1] The sections 16, 36, 67 (and 60, if a Forest Officer) contemplate the special appointment (by notification or otherwise) of the Forest Officer intended to be empowered; sections 43, 44, 45, 49, 52, 55, 58, 61, 62, 63, 64, 69, 71, 72, 74, 75, 78, 82, speak of "a" or "any" Forest Officer; sections 20, 24, 25 (*i*), 33, 38, 46, 47, 50, 56, speak of "*the*" Forest Officer (as known by rules under section 75*a*).

As an example of how rules (under section 75) regarding powers may be framed, I give those of the Panjáb:—

No. 533F.—*Notification.*—The Lieutenant-Governor is pleased, under section 75 of Act VII. of 1878 (The Indian Forest Act), to prescribe and limit the duties of Forest Officers . . . . by the following rules:—

(1) The Conservator of Forests, all Deputy Conservators, Assistant Conservators, Sub-Assistant Conservators, Forest Rangers, Foresters, and Forest Guards are appointed to do all acts, and exercise all powers that are prescribed by the Act, or by Rules made under it, to be done by a Forest Officer or by any Forest Officer.

(2) The Forest Officers mentioned in the first column of the following schedule

sary is that the Local Government should notify what individual officers or grades or classes of officers may act under the different sections; the officers so specified are those "specially empowered" as regards those sections.

There is no special process of *enrolment* even for the "rank and file" (*i.e.*, the protective staff) of the forest service. In the case of the police force, for example, each officer is furnished with a formal certificate of service; and then the law provides that he is vested with the powers, functions, and privileges of a Police Officer. The Inspector-General of Police can make rules under the Act, regarding equipment and organization. By law, Police Officers are bound not to be absent without leave, not to resign without giving two months' notice, not to trade, not to

shall exercise the powers under the sections of the Act mentioned in the second column of the same opposite each class of officers respectively :—

| Class of Officers empowered. | Section of the Act under which powers are given. | Brief description of nature of powers conferred. |
|---|---|---|
| I.—All Deputy Conservators, Assistant Conservators and Sub-Assistant Conservators, when in charge of Forest Divisions | 20 | To publish translation of notifications in reserved forests. |
| | 25 | To notify seasons during which the kindling, &c., of fire is not prohibited. |
| | 45 | To notify depôts for drift timber, &c. |
| | 46 | To issue notice to claimants of drift timber, &c. |
| | 47 | To decide claims to drift timber, &c. |
| | 50 | To receive payments on account of drift timber, &c. |
| | 60 | To direct release of property seized. |
| | 82 | To take possession of and sell forest produce for Government dues. |
| II.—All Deputy Conservators, Assistant Conservators, and Sub-Assistant Conservators, Forest Rangers, and Foresters when specially authorized in that behalf by the Conservator of Forests | 25 | To permit acts otherwise prohibited in reserved forests. |
| | 33 | To permit acts otherwise prohibited in protected forests. |

(3) Conservators of Forests are empowered to exercise all or any of the powers conferred in the foregoing schedule.

(4) Conservators of Forests are empowered, under section 24 of the Act, with the previous sanction of the Commissioner of the Division, to stop ways and watercourses in reserved forests, subject to the provisions of that section.

break rules wilfully, nor to exhibit cowardice, nor offer personal violence to persons in their custody; and a breach of any of these rules involves liability to a fine or loss of pay, and also to a criminal penalty of three months' imprisonment and fine.[1]

There is, however, as a matter of principle, a dislike to invoke the aid of criminal law and penalties whenever contract obligations may possibly suffice; and therefore these legal provisions have not been enacted in the case of Forest Officers.

It might, therefore, happen that a Forest Officer of the subordinate staff suspended for misconduct, might defy his superiors, by giving a month's notice (as the service is on monthly salary) to quit, or might leave without notice (forfeiting his right to pay); and he could do so with impunity, the only remedy being an action for damages. But this and other acts of misfeasance may be guarded against by making it a condition of appointment that the nominee should furnish *security*, of one or more solvent and respectable persons, for his good conduct and obedience to rules.[2]

The question, therefore, of *suspending* a Forest Officer, *fining* him for neglect, or *dismissing* him for misconduct, depends on his contract obligation (implied, or expressed in a covenant) to obey the rules of his service; and these rules are clearly laid down in the Departmental Code.[3] In only one case does the Forest law itself make mention of a subject of service discipline, which will be mentioned presently.

[1] See Act V. of 1861 (Police Act), sections 7, 8, 9, 10 and 29.

[2] This condition Government has an obvious right to insist on, before giving an appointment; but the matter has not yet, as far as I am aware, been the subject of any official orders. I would remark that security should be always either by deposit of cash (in Government Savings' Bank so as to bear interest) or of Government securities, or be the personal security of persons, as stated in the text. The hypothecation of land or houses is very unsatisfactory, as there is always difficulty about realization even if the value is not doubtful.

[3] In many of the continental laws these matters are minutely regulated by law. As a remarkable example, I may allude to the law of public service (*Staatsdienergesetz*) of Saxony (7th March, 1835). Here various grades of punishment are contemplated—(1) actual dismissal, (2) suspension for a time, (3) official reprimand with or without fine up to 50 thalers in case of a superior, or being put under arrest for a term not exceeding eight days in that of an inferior officer.

Actual dismissal is lawful—

(*a*) On conviction of certain offences (specified in the law), or any offence punishable with imprisonment for more than six months, or when the public servant has been *accused* of such an offence but has been *acquitted* in an *unsatisfactory way* (details are given, but would not be intelligible to the English student).

(*b*) And so in cases of offences which are such that public respect and confidence must be withdrawn from a public servant guilty of them.

(*c*) For certain acts expressly threatened with dismissal in the "*Dienst Instruc-*

The Departmental Code also governs reduction in rank (secs. 36-7). Dismissal, both in the superior grades and in the inferior, is similarly provided for in sec. 46. Subordinate officers are also liable to fine under sec. 47.

So also the Code has to be referred to for the *departmental* duties of Forest Officers.

The intention is gradually to divide the service into distinct classes; the lower being purely *protective*, the next *executive*, carrying out surveys, demarcation, planting, fencing, felling, thinning, and all other works; and the highest being the *controlling staff*, its duty being to give instructions as to what work is to be done and how, and to see by constant *inspection* that it is going on properly, and that all grades do their duty effectively. At present, the state of affairs does not admit of this division being completely carried out,[1] and the executive and controlling

*tion*" or standing orders of service handed over to the official on receiving his appointment.

(*d*) On becoming bankrupt.

* * * * * * *

In all cases of notice of dismissal, an opportunity of making a defence is to be given.

The lesser punishments indicated above, may be inflicted according to circumstances.

First the reprimand is tried, then the suspension, which in itself operates as a "second reprimand;" and after the second reprimand, a repetition of the offence entails dismissal. Offences so dealt with are—

(*a*) The officer has been punished with imprisonment for lesser crimes than those above stated;

(*b*) Is habitually addicted to immoral conduct;

(*c*) Lowers himself in the public estimation, especially by habitually consorting with low characters or loose women, habitual drunkenness, reckless getting into debt, gambling, making use of his official position for his own unlawful benefit, habitual ill-temper and unaccommodating disposition in his official relations;

(*d*) Improper disclosure of official matters;

(*e*) Habitual disposition to revile publicly the internal rules and regulations of the State and its officials;

(*f*) Harsh and degrading treatment of subordinates or of private persons in his official relations with them, or arbitrary and capricious conduct towards inferiors;

(*g*) Connivance with inferiors in the irregular or unfaithful discharge of their duty;

(*h*) Neglect to give proper supervision and attention to subordinates.

[1] The French organization draws a distinction between Forest Officers as "*préposé*" and as "*agent*." The former includes what we should call the protective staff only, the latter the controlling and executive. The former are the *gardes* of cantons or beats and the "*brigadiers*;" the latter are the "Conservateurs," "Inspecteurs, Sous-Inspecteurs and Gardes Généraux." The former only have the power of arrest; they make the formal statement (*constatation*) of forest offences; and if the latter do the same to a certain extent, it is only as secondary duty to enable them to fulfil their primary duty. The Guards make the official report and "*constatation*," the "agents" carry the prosecution to Court (Code F.,

branches are not yet completely separated. Forest Officers of all grades, are, to a greater or less extent, the guardians and managers of public property, both forest property and public money; for in India, Forest Officers have to receive revenue paid into their hands, and consequently to *keep accounts* of this as part of their receipts, along with the funds they are entrusted with to pay for work done and materials supplied, &c.

In India no oath (or solemn affirmation) on taking service, is required by law or by rules of service (see Act X. of 1873, sec. 16).

It is not thought necessary. A good man will do his duty without such a formality; a bad man will hardly be much influenced by it. In either case the general law and the responsibility under contract of service are better guarantees for effective service than oath.[1]

On the other hand, the Police law might well be imitated in giving a *formal certificate*, the retention of which after dismissal, should be made penal; and above all the Saxon plan of giving a "*Dienst instruktion*," or printed form showing briefly the main heads of service obligation, and the acts which entail dismissal, is worthy of adoption in India.

At present also, no standard or official orders have been issued about uniform; but as the service develops this will be necessary. Because it is important that persons who may be warned or prevented from doing certain acts, and even arrested, by a Forest Officer, should be able to know by his dress and badges, who he is and what *primâ facie* is his official position. As a matter of practice, the superior staff wear nothing in the way of uniform or distinctive mark; and the subordinate staff wear a sort of uniform,

171–4) Manuel de Législation Forestière. (A. Puton, Paris, 1876, pages 50 and 113.) In France, Forest Officers have nothing to do with realizing revenue or with civil suits, nor can they represent the State in any question of proprietary right, exchange, and grant of rights, &c. (*Op. cit.*, pp. 57 8 and 93–94).

[1] This view is not taken on the Continent. The laws always (as far as I am aware) require an oath of service. (See, for example, Code For., Art. 5.) Similar importance is attached to uniform as indicating to the public the service and rank of the wearer. (See Art. 34, Ord. Regl., which requires Forest Officers on duty to be in uniform.) When the Forest Officer draws up his *procès verbal*, a document of which I shall speak hereafter, stating the facts of forest cases which have come under his official notice, the form always states that at the time he had duly taken the oath of service and was clothed with the distinctive marks of office (*assermentés et revêtus des marques distinctives de nos fonctions*), see Code For., Art. 160, and the forms given in the Guide Forestier. So under the Prussian law (see Eding, p. 182), the Forest Officer is justified in using his weapons under special circumstances, but he *must be in uniform* or with a badge of authority *in Uniform oder mit einem amtlichen Abzeichen versehen*).

but not the same in all provinces, or even in all divisions of one province, and are furnished with a badge. It is desirable that this should be put on a proper footing; because under sec. 171 of the Penal Code, it is a criminal offence for a person not belonging to a certain class of public servants, to "wear any garb or carry any token" resembling any garb or token used by that class of public servants. It is true that there is nothing said about the "token" (it may be a "chaprás" or badge or a truncheon or a weapon of a given pattern) or the uniform, being prescribed by rule of any kind; it is merely that such garb is, as a fact, usually worn by the class of public servant in question. Still the official regulation of these matters is desirable, and would prevent questions arising.[1]

### (III.) The Special Obligations of Forest Officers under the Forest and General Law.

In order that the undivided time and attention of Forest Officers may be given to their duties, as well as to keep them free, in the general estimation, from suspicion of any interest in work going on, it is prescribed by law (Indian Act, sec. 74; Burma, sec. 73, Madras, sec. 62) that, except with the written permission of the Local Government, no Forest Officer "shall, as principal or agent, trade in timber or forest produce, or be[2] or become, interested in any lease of any forest, or in any contract for working any forest, whether in British or foreign territory." This is the only case in which a matter of service discipline is mentioned in the Forest Act.

There is also a provision in sec. 11 of the Departmental Code which explains the details of the prohibition, and being obligatory on the service (as I have explained) by contract, also places him under a *legal obligation*. This paragraph runs as follows:—

"Except with the permission in writing of the Local Government, no Forest Officer shall acquire or continue to hold cultivated land, or land intended to be cultivated, or forest land, in any province to

[1] In France the uniform and accoutrements of all grades are laid down in the Ordonnance Réglementaire, Art. 18, and the decree of 17th November, 1852 (see page 103 of the pocket edition of the Forest Codes). See also the preceding note regarding the oath of service.

[2] So that if before the Act came into force he held any such contract, he must at once get free of it.

which he is temporarily or permanently posted, or with the administration of which he is concerned.

"In the case of Forest Officers who are natives of India, and who may possess or acquire landed property, ancestral or other, it will be sufficient that a detailed report of the situation, nature, and extent of such property be furnished to the Conservator of Forests, who will, under the control of the Local Government, pass such orders as may be necessary.

* * * * *[1]

"Unless specially authorized by the Local Government, forest officers must abstain from any investment (though of itself unobjectionable), which interests them privately, in affairs or undertakings of the kind with which their public duty is connected.

"And generally it is a rule of service that no Forest Officer is permitted to engage in any speculation or mercantile transaction of such a nature as to engross his attention and divert it from his public duty, or such as to give rise to a belief that his official position may have had influence, by obtaining favourable terms or otherwise, in respect of such transactions.

"The above provisions apply to officers of the superior staff as well as to forest rangers, foresters, forest guards, and members of office establishments."

An offence against either the section of the Forest Act or the service rule in the Code[2] would be punishable under sec. 168 of the Indian Penal Code.[3]

The Forest Act provides a penalty against Police or Forest Officers who "vexatiously *and* unnecessarily" seize any property

[1] The lines omitted repeat *verbatim* section 74 of the India Forest Act, already quoted.

[2] With reference to the definition of the terms "illegal"—"legally bound" in the Penal Code, the term "legally bound" is applicable to everything (*a*) which is an offence, or (*b*) is prohibited by law, or (*c*) *which furnishes a ground for civil action.* Any breach of a service rule or obligation would at least come under the last of these.

Section 169 (I. P. C.) also punishes the bidding at an auction, by a public servant who is bound not to bid.

[3] In France (Code F., Art. 4) the Forest Officer's employment is declared incompatible with any other office; and the Ordonnance also adds other occupations that he may not engage in, for instance he must not trade in wood, or have any trade in which wood is the principal material employed. Nor must he keep an inn or sell drink. By Code F., Art. 21, he is barred (and certain of his near relations also) from bidding, directly or indirectly, or taking part in purchases of forest produce put up to auction. The "*adjudication*" of sale would be void and a heavy penalty due besides.

By the Saxon law (that alluded to in a previous note), the public servant must not engage in any trade or profession (*Erwerbzweig*), nor in any occupation, incompatible with the dignity (*Würde*) of his office, or that would conflict with his public duty.

under colour of seizing property liable to confiscation under the Act (Indian Act, sec. 61 ; Burma Act, sec. 61).[1] The Madras Act (sec. 52) makes this apply also to vexatious arrest of the person.

But besides these, the general law (of the Indian Penal Code) lays certain obligations on all public servants; and Forest Officers, no less than others, would be liable to prosecution, as such public servants, for breach of the provisions.

I shall here only allude to such sections as it is possible, in practice, to require reference to, in the Forest service.

A Forest Officer concealing, by any act or illegal omission, a design to commit an offence which it is his duty to prevent, or making a false representation regarding such design, would be punishable under sec. 119, Indian Penal Code.[2]

Should he go further and actually aid in or *abet* the offence, he would be liable, under sec. 116, to *double* the penalty a private person would.

The offence of bribery (or as it is technically called, receiving an illegal gratification),[3] is also one which needs mention.

The principal section (Indian Penal Code, sec. 161) may be exhibited analytically, thus :—

{ A public servant, or
{ A person *expecting to be* a public servant, who,—

[1] As M. Puton neatly expresses it, these legal provisions are the counterpoise to the legal authority given to forest officers. "*La possibilité d'une peine est le contrepoids de l'autorité qui leur est confiée.*" But as M. Puton adds, in France, and I hope it is true also in India, no case has yet come up in which these penalties have had to be inflicted, and they might well be dispensed with, seeing the sufficiency of the service rules for control and punishment (Manuel, p. 48).

[2] This does not apply to cases of negligence, or mere carelessness in execution of duty. But a forest guard who allows cattle to trespass in a closed forest, or other offences to happen, may be held responsible as a matter of ordinary service obligation.

In the French Code (Art. 6), there is an excellent provision that guards are (pecuniarily) responsible for forest offences that occur in their beat (*délits, degâts, abus, et abroutissements,*"—offences, injuries, and browsing by cattle). They are liable to pay the fines and damages that the delinquent would have incurred, unless they have properly done their duty in discovering the offender and making the necessary report of the offence.

In India, when a Forest Officer allows trespass and so forth by negligence or inattention to his duty, the remedy is to reprimand, fine, or even dismiss him (in grave cases) departmentally.

[3] Gratification need not be money (*Explan.* to Section 161). "Legal remuneration" is not confined to Government pay, but is anything which "he is permitted by the Government he serves, to accept."

Accepts [when offered *without* overture on his part],
Obtains [when *there is* an overture on his part],
Agrees to accept [has an understanding with the offerer],
Attempts to obtain [*e.g.*, solicits, or hints that he would like].

From any person, for himself *or for any other person*, any gratification *other* than his lawful remuneration, as a *motive* or *reward*[1] for—

| | | |
|---|---|---|
| Doing any official act, | | |
| Forbearing to do any official act, | | |
| Showing | favour | in exercise of official functions. |
| Forbearing to show | disfavour | |
| Rendering | Service | with Government[2] or any public servant; |
| Attempting to render | Dis-service | |

is liable to imprisonment which may extend to three years or to fine, or both.

The person who gives or offers, &c., the bribe is liable as an abettor.

Nor is it only this more direct form of bribery that is punishable. A public servant who obtains any *valuable thing* (*e.g.*, a horse, a lease of a house, a loan of money on easy terms) either without any equivalent or "consideration," or for a consideration which he knows to be inadequate, from any person whom he knows to *have been*, to *be*, or *to be likely to be*, connected, *in any way*, with his own official business, *or that of his superior* officer, or even from a person, who is *interested in* or *related to* a person so connected, is liable under sec. 165, Indian Penal Code.

So also, a person may not venture to offer a gratification[3] to a public servant directly; but he may offer it to a *third* person who

[1] *Motive* before the act, *reward* after it. It is wholly immaterial whether he really did the thing or intended to do it; it is no excuse to say "I took bribe as a *motive to do* the thing, but all the while I never intended to do it," nor "I took the *reward* as for a thing done, but I have not really done it." (See *Explan.* to Section in the Code).

[2] "Government" here means the Government of India, or any Local Government either in the executive or legislative branches.

[3] In order that public servants may remain not only free from temptation to actual offences, but free from suspicion of being influenced, there are various rules about their not accepting gifts at any time. By law (13 George III. c. 63, sections 23-5, and 33 George III. c. 52, section 62 also), the receiving of gifts from any of the Indian Princes or any "Native of Asia" by any person holding

undertakes to *induce* by *corrupt* or illegal *means* (I. P. C., sec. 162), or to use his *personal influence* with and so induce (sec. 163) the public servant, so that he may do or not do something, or show favour or disfavour in his official dealings. This is punishable. In these cases the public servant may be entirely ignorant of the acts of the others, and therefore under no liability; but should he abet them, he becomes liable to a severer punishment under sec. 164 than could be given under sec. 162 or 163.

The illustration given explains this. A. is a public servant, B. is his wife. C. comes to B. and begs her to use influence with A. to get an appointment for C. himself, or some other, and gives her a gold bracelet. Here B. would be liable under section 163 to one year's imprisonment, but if A. knows of it and abets her, he would be liable, under section 164, to three years' imprisonment.

It is necessary that these stringent provisions should exist; but, on the other hand, the very stringency of them makes it possible for persons, from motives of spite, or to annoy a public servant whose duty, however faithfully discharged, may be obnoxious to them, to get up false and vexatious charges of such offences. If then a prosecution is undertaken against a public servant, *as such*, there are certain preliminary sanctions necessary, which will be alluded to in their proper place.

There are also some provisions of the Indian Penal Code which are in their nature to be classed with section 61 of the Forest Act, to which I have already alluded (p. 461). They refer to cases where the *authority* or *power* of a public servant is *misused* with intent to injure.

In these cases no bribe may be offered, but the public servant is actuated by a spontaneous desire to injure or annoy some person obnoxious to him.

office under the Crown or the East India Company is forbidden and is punishable; but this does not apply to fees taken by lawyers, physicians, chaplains, &c.

It is difficult sometimes, without giving great offence, to refuse a present, but a public officer should endeavour to explain the matter with courtesy and so avoid the gift. If it is on some formal ceremony or official occasion, where the gift cannot be refused, it is accepted and afterwards handed over to the Government "*toshakhána*." Only presents of absolutely no value, that are merely complimentary, and that it would give offence to refuse, such as flowers or fruits, can be received: and even this should be discouraged and eventually dropped.

In France, Art. 55 of the Ordonnance Regulation *absolutely* prohibits the receiving of gifts.

A public servant disobeying any direction *of the law* as to the way in which he is to conduct himself, is liable under sec. 166, Indian Penal Code.

If it be his duty to draw up or translate some official document, and he intentionally does it wrong, to injure someone,[1] or knowing that injury will be likely, he is liable under sec. 167, Indian Penal Code. An offence similar to that in sec. 166, if committed in order to save a person from legal punishment or diminish that punishment, or to save property from legal forfeiture or other charge, is punishable under sec. 217; and so an offence similar to that in sec. 167, but committed with this object, will come under sec. 218.

As a Forest Officer is required to prevent offences, and has a power of arrest, it is possible that cases under sec. 221 may occur, in which a Forest Officer may commit an offence by intentionally omitting to apprehend an offender or intentionally suffering or aiding his escape.[2]

Lastly there may be special forms of the offence of criminal breach of trust,[3] when it is committed by a public servant (Indian Penal Code, sec. 409). All these are offences in which to make the section quoted applicable, the offender must be a public servant.

There are some offences which are not directly connected with Forest work, but nevertheless may possibly occur in connection with the public duty of Forest Officers, clerks, &c., such as making false entries in books, and fabricating false evidence (secs. 192 3, Indian Penal Code).

Signing or issuing a false certificate (sec. 197), making a false statement in a declaration receivable as evidence (sec. 199), causing disappearance of evidence to screen an offender (sec. 211), making a false charge with intent to injure (sec. 211), making a false document (sec. 464), are kindred offences. These, however, need no special explanation.

[1] That is quite a different thing to forging or falsifying accounts, &c. These are punishable under other sections, for forgery, cheating, &c.

[2] And the person in this case to be arrested, &c., may be guilty of a *forest* offence, for the term "offences" in sec. 221 includes offences under special laws (sec 4, O. T. P. C.).

[3] The difference between theft, criminal misappropriation and criminal breach of trust has been explained in the sections on Criminal Law. See p. 120.

*Misconduct not involving a Legal Offence.*

The liability of Forest Officers for breaches of duty not amounting to any criminal offence, such as negligence, insubordination, drunkenness, or immorality interfering with his public duty or character as a public servant, is, as I have said, dependent on departmental rules; fine or dismissal are the appropriate remedies, according to the rank of the offender, under various clauses of the Departmental Code.

In cases where a Forest Officer is charged with an offence or with misconduct, or is under a criminal charge as a private person (which charge is disgraceful to him as a public servant, and conviction of which would render him unfit to be retained in the service), he should be *suspended* from his duty during the enquiry. Whether he is reinstated and allowed his pay for the time he has been suspended, depends on the result of the case, and the view taken of his conduct by the authorities.[1] In ordinary cases, the head of the department causes an enquiry to be made, and sends the case up for orders, if he cannot, under departmental rules, dispose of it himself. In all cases, the charge, the defence, and the order passed, should be in writing. As regards defence, it is important (even if, in the course of enquiry, the suspended officer has *practically* been heard, and his excuse is known) still to give him a formal opportunity for submitting a full written defence, taking care that he is furnished with the necessary copies, extracts, &c., to enable him to know all that is charged against him, and reply to all the evidence.[2]

In the case of officers not removable without sanction of Government,[3] and when any formal enquiry or departmental investigation is needed, there is a special Act (XXXVII. of 1850), authorising Government to appoint a Commission or to direct the Court or Board to which such officer is subordinate, to hold a "formal and public" enquiry. Articles of charge are to be drawn up, and evidence is to be heard; in fact the whole enquiry is conducted much like a trial in Court. This Act is but rarely had recourse to; and this brief notice of it will be sufficient.

[1] See Government of India Resolution, Home Department, No. 37, 29 July, 1879. This resolution also acknowledges the right of a person dismissed, &c., to appeal.

[2] Rules about suspension, subsistence allowance during it, and the ultimate grant or refusal of the pay accruing during the term of such suspension, according to the result of the enquiry, are to be found in the note to sec. 54 of the Civil Pension Code. The Forest Code mentions the suspension of the subordinate staff (Forest Rangers and downwards) by the divisional officers, pending the Conservator's orders (sec. 46).

[3] The Act only alludes to officers in the service of Government not removable without the sanction of Government; and "Government" is defined in the Act to mean the Governor-General in Council, and the Governors and Lieutenant-Governors of Provinces.

# LECTURE XXVII.

## THE LEGAL ORGANISATION OF THE FOREST SERVICE—(*Concluded*).

### (IV.) -The Protection extended by law to Forest Officers

UNDER the preceding head we considered the obligations that Forest Officers were under, and the care necessary on their part to avoid every suspicion that might arise from their being concerned in trading transactions, or from their receiving gifts of any kind in their official character. But the very existence of the necessary legal provisions in these matters, may also render Forest Officers (and public servants generally) liable to unjust comment, and even to malicious accusation, since those officers have often to discharge a duty which is displeasing to individuals or curtails their liberty, and so may give rise to feelings of enmity and an unworthy desire of revenge. Forest Officers, therefore, are protected by law, both as regards civil suits and criminal prosecutions. By sec. 78 of the Indian Act (Burma 72, Madras 61), no civil suit will lie against any public servant for anything done by him in good faith *under the Act*.[1] Nor can a Forest Officer be held liable for loss of timber taken charge of under sec. 45 of the Act, or stored at a depot under sec. 41, unless there is fraud or malice.[2] (See secs. 48 and 49, and Burma, sec. 79.)

This does not mean, that a suit cannot be brought against the

[1] Or under Rules which are made pursuant to the Act and are therefore (so to speak) part of it. (See Burma Act, sec. 72.) A similar provision ought to be added to the Forest Regulations of Hazara and Ajmer.

[2] It may be useful here to refer to the English law, as explained in Broom's Constitutional Law (ed. 1866, pages 618–9). The author says that an action will not lie against a public agent for anything done by him in his public character or employment, though alleged to be, in the particular instance, a breach of such employment and constituting a particular and personal liability. And no such person is understood personally to contract.

On principles of public policy an action will not lie against a person acting in a public character and situation which from its very nature might expose him to an infinite multiplicity of actions, at the instance of any person who might suppose himself aggrieved. The very liability to such suits would in all proba

Government (see p. 31) or against a public officer, on a matter of breach of a (Government) contract, or some claim or question of right to money, or to land, &c.: it relates to *official Acts, under the Forest Law.*

If any person is aggrieved, he must bring the officer's conduct to the notice of his superiors, and if there is anything wrong he can be departmentally reprimanded or punished, or if it amounts to a criminal breach of duty, a prosecution can be sanctioned.

The Burma and Madras Acts, besides mentioning civil suits, also specifically mention a criminal prosecution, which the Indian Act does not. But the same result is practically attained by the provisions of the General Criminal Law (Indian Penal Code), which declares (secs. 76–79) that nothing is an offence which is done by a person who is justified by law in doing it, or who, by reason of a mistake of *fact* (not a mistake of *law*), in good faith believed himself to be justified in doing it.

I may here mention that a subordinate officer, if ordered by his superior to do an act which was criminal or clearly illegal, would not be justified in doing it. If he obeyed the order he would nevertheless be subject to trial and conviction; though the circumstances might be such as would make it only just for the Government to exercise its prerogative of pardon. Even the orders of Government would not be a protection, unless the

bility prevent any prudent person from accepting any public situation at such hazard or peril to himself. But he might be liable for an act or tort, wrongful in itself and injurious to another. If such an act was done under orders, or in the belief that it was authorized and lawful, the principle was laid down in the case *Rogers* versus *Dutt*, quoted by the author I am alluding to. "But let us assume," said the Court in that case, "that the particular act complained of is to be viewed as the act of Government, and that in the part which the defendant (the public servant) took, he acted merely as the officer of Government, intending to discharge his duty as a public servant in perfect good faith and without malice, general or particular, against the plaintiff. Even on this assumption, if the act complained of was wrongful as against plaintiff and produced damage to him, he (the plaintiff) must have the same remedy by action against the doer, whether the act was his own, spontaneous and unauthorized, or whether it was done by order of the superior power. The civil irresponsibility of the supreme power for tortious acts could not be theoretically maintained with any show of justice if its agents were not personally responsible for them: in such cases the Government is morally bound to indemnify its agent . . . . . but the right to compensation to the party injured is paramount to this consideration. that is to say, special circumstances may render even a public servant personally responsible for acts *bonâ fide* done by him on behalf of the public, which in the contemplation of the law injuriously affect another." (*Op. cit.*, pp. 619–20.)

The head of the department cannot be made liable for the remissness of his subordinates (Broom, p. 244).

circumstances were such that the whole transaction was "an act of State" (as for example during war, &c.) and beyond the cognizance of the Courts.[1]

But even supposing a public servant has actually committed an offence, taken a bribe, or what not, *as such* public servant, it is not lawful for everyone to institute a prosecution as he might against a private person. By sec. 197 of the Crim. Pro. Code, a public servant of such a rank that he is not removeable from his office without the sanction of Government (which is a matter either determined by some Act, or by departmental rules), can only be prosecuted for an offence[2] committed by him *in his capacity* of public servant, "with the sanction or under the direction of the Government having power to order his removal or of some officer empowered on this behalf by such Government or of some . . . . authority to which such public servant is subordinate, and whose power to give such sanction has not been limited by such Government."[3]

It will be observed that this protection is given to the superior orders of public servants. Those removeable by any authority without the sanction of Government, may be prosecuted without sanction.

It will also be observed that this sanction only refers to cases where the public servant is accused *as such:* thus, if a Forest Officer were to commit a theft, he could be prosecuted like any one else, for the offence has nothing to do with his being a public servant; but if, as a Forest Ranger, he took a bribe to allow cattle to graze (for example), here, his being a public servant is the essence of the offence: so if he forged a public document; but not if he forged a bond or a relation's will, which had only reference to his private personality.

It may happen that a Forest Officer, prosecuted and convicted of an offence as a private individual, will be so affected in cha-

[1] For further particulars see note in Mayne's Ind. Penal Code (9th ed.), p. 55, and Broom's Constitutional Law (ed. of 1866), p. 621.

[2] An offence against the Indian Penal Code *or any* other law: "offence" has not a restricted meaning in the Criminal Procedure Code as it has in the Indian Penal Code.

[3] The words omitted refer to Courts and Judges and do not affect the point we are considering.

[4] Though such persons may be prosecuted by private parties without any sanction, if it is intended to prosecute them departmentally, there may be service rules regarding a report to be made to the Conservator of Forests. (See Forest Department Code, para. 46.)

racter and in public estimation, by the result, that he would be unfit for retention in the public service, and so the fact of his prosecution would come under official cognizance; but that is obviously a different matter, and has nothing to do with the prosecution itself.[1]

## (V.) The Legal Powers of Forest Officers.

### *Arrest and Seizure.*

By the Indian Forest Act (sec. 63) any Forest Officer (or Police Officer) may without orders from a Magistrate, and without a warrant, "arrest any person against whom a reasonable suspicion exists of his having been concerned (*i.e.*, as a principal or abettor) in any forest offence, provided that the offence was punishable with at least one month's imprisonment. This power does not extend to offences against rules made for the management of "Protected Forests" except in the case of offences against a prohibition notified under sec. 29.

There must be no "unnecessary" delay in sending the person arrested before a Magistrate having jurisdiction.

The Burma Act (sec. 63) has somewhat restricted this power. Here the arrest can only take place if the offender refuses to give his name and residence, or gives one that is false, or if there is reason to believe that he will abscond. The Madras Act (sec. 51), has adopted the same restriction.

Forest Officers are (under all the Acts) entitled to seize all forest produce in respect of which there is reason to believe a forest offence has been committed, as well as all cattle, tools, boats, carts, &c., used in committing it (Ind., sec. 52; B., *id.*; M. 41). This subject has been dealt with in the Lecture on Forest Protection (p. 436) so that further notice is not here needed. A mark has to be put on the property seized, and a report made at once to the Magistrate having jurisdiction: where

[1] The Continental law usually contains provisions requiring sanction before prosecuting a Forest Officer. In France, for example, Forest Officers can only be prosecuted for acts done in their public character (*faits relatifs à leurs fonctions*) with previous sanction. (Curasson, I., page 123.) This sanction is prescribed in detail by the Ordonnance Réglem: Art. 39. To prosecute a Garde Général the Director-General's sanction is needed; for that of an Inspector, the sanction of the Minister of Finance, and for a Conservator, that of the Conseil d'État.

property is seized and no offender is found, then a report to the seizing officer's superior is alone necessary.[1]

*Preventive Powers—Aid and Information.*

Forest Officers (and Police Officers) are bound to prevent, and may interpose for the purpose of preventing, forest offences.[2] This would naturally include the right of warning people, and of taking cognizance of persons wandering about in the forest armed with axes, saws, &c. This latter is, in the French law, in itself an offence; in India it might be (sec. 25*d*) an offence under circumstances which the Magistrate held to amount to a "trespass" within the meaning of the section.

Forest Officers, properly empowered, are also entitled to guard against fire, by notifying certain seasons *during which only* the carrying of fire in Reserved Forests is permitted (see p. 398).

In certain cases, Forest Officers are empowered to demand aid in the execution of their functions. All that is necessary under this head has been said in speaking of "Protection" (see p. 430).

The foregoing paragraphs have indicated that Police Officers have the same powers as Forest Officers in some cases, as in arrest, prevention, &c. But as to the general question of police aid when requested by a Forest Officer, nothing is said in the Act about Forest Officers having a right to demand the aid of the public force (Police) in searching for stolen property, or in preventing offences, or arresting offenders, or in cases of fire. But as in such cases the Police are themselves empowered to act, it is presumed that they would be bound to give aid to Forest Officers acting in the same way.[3] And of course a Forest Officer can call on any other Forest Officer to help him.

[1] The French law also recognizes a similar "*saisie*;" and there is also the "*séquestre*" (Puton, 135). The *saisie* simply leaves the property where it is but makes it inalienable—no attempt to do anything with it has any legal effect—it is "*frappé d'indisponibilité*." Cattle can be so seized, and stolen wood (C. F., 161, also C. F., 81, 84, 146, 152). *Séquestre* is when the property needs to be moved and taken care of and deposited with some one (Puton, 140); the cases in which this process is adopted are expressly defined by the law; and it is not made use of in other cases.

[2] See p. 399. The French Code (Art 163) gives power to arrest persons only when caught in the act of committing a forest offence. This applies to guards, &c. (*préposés* not *agents*, see Puton, p. 114; see also p. 145).

[3] See also sec. 150 of the Criminal Procedure Code: this shows that the Police would be bound to give information to the Forest Officer. The French Code (Art. 164) provides: "The officers and guards of the Forest administration have the right to require directly the aid of the public force in the repression of

Under the Criminal Procedure Code, if it is a case of an offence of the graver kind (*e.g.*, theft), cognizable by the Police, the Police would be bound to take up the case on the information of a Forest Officer. Under the Forest Act also, all offences (except those minor ones above alluded to—p. 470, sec. 63, Indian Forest Act) are "cognizable" by the Police; hence, according to sec. 156 of the Criminal Procedure Code, the Police Officer has power to investigate any such case, and is bound to do so (sec. 157) if it occurred within his jurisdiction, unless the proviso to the section applies.

*Use of Force.*

I may also give a passing notice to a question which may arise, *viz.*, whether a Forest Officer is justified in using his weapons in preventing offences, &c. As to necessary force used in effecting an arrest (see p. 151). But in other cases, no special rule is laid down; and of course the usual law of the right of private defence applies to Forest Officers as to any others (p. 105).[1] Forest Officers are exempted (Act XI., 1878, sec. 1.) from the Arms Act as far as relates to any arms they may be directed by service rules to carry *as Forest Officers.*

The powers incidental to an arrest, such as the power of entering a house, breaking a door and so forth, have been already described (p. 151). And the "search warrant" has also been alluded to (p. 156). Forest Officers may be invested with power themselves to issue search warrants (Indian Act, sec. 71; Burma 70; Madras 59 *c*). This power as before remarked would be

forest offences (both *délits*—graver offences, and '*contraventions*' or minor ones) as well as in search for and seizure of wood illegally cut or fraudulently sold or bought." Forest Officers of all ranks form part of the military force of the country (Puton, page 153). Forest Officers can therefore demand the aid of other Forest Officers. In a few Indian Acts (*e.g.*, Customs Act, VIII. of 1875, sec. 25), officers are expressly empowered to demand police aid. I take this opportunity of stating that the Forest force is in its turn bound to aid the Police or Magistracy in the cases mentioned in secs. 42-5, Criminal Procedure Code; these sections the student should read.

[1] I may usefully refer here to the continental law by way of illustration :—

By the Prussian law (*Eding*, p. 182), Forest Officers (who must be in uniform, or with distinctive marks of office, in order to be justified in so doing) may use their weapons against forest offenders—

(1) When an attack (*Angriff*) on the officer's person is made or threatened,

(2) When resistance is actually offered, or threatened so as to cause apprehension of danger (*gefährliche Drohung*).

This use of weapons may only be made as far as is necessary for defence. the Austrian law (Forstgesetz of 1852, Art. 53).

chiefly desirable where there is a very large timber trade, and the locality is such that timber thieves have opportunities for concealing and making away with timber.

*Power to Compound Offences.*

Officers specially empowered by the Local Government under sec. 67 of the Indian F. Act (Burma, sec. 66:—both as amended by sec. 13, Act V. of 1890; see also Madras, secs. 55, 59 *d*), have the right to "compound" all forest offences (except those grave ones specified in sec. 62 of the Act). The composition consists in accepting a sum of money: if this is paid, the person is set free, and any property or cattle seized is let go.[1] The India and Burma Acts limit the amount to Rs. 50. Madras does not fix a limit.

It will be observed that the Act makes it sufficient that there should be a "reasonable suspicion" that the person has committed the offence. The person accused is perfectly free to decline to pay the sum required. If he thinks the sum too high, or that he has committed no offence, or can show a valid excuse, he may refuse to pay and submit to be tried for the alleged offence before a Magistrate.[2]

The powers under this section, cannot (under the India and Burma Acts) be conferred on an officer of lower rank than that of Forest Ranger, or one drawing a salary less than Rs. 100 *per mensem*. (The salary marks a certain degree of rank and standing.) In Madras (sec. 55) any officer may be specially empowered. It is perhaps hardly necessary to add that when the power is exercised, a formal (if brief) order or proceeding should be recorded, stating the facts and the sum demanded. Probably there are Departmental rules about this.

*Powers under Sec. 71 I. F. A.*

Lastly, Forest Officers may be invested with certain special powers under sec. 71, Indian Forest Act (Burma, sec. 70;

[1] I have discussed this matter at page 436 ff.

[2] This is so also in France (Code Forest Art. 159); it is spoken of as "transaction" (*transiger* is the verb). The forest "Agent" (not *Préposé*) can compound any Forest offence or claim for reparation, at any time before judgment; and even after judgment, but only in respect of money penalties or compensation. This is clearly explained in Puton, *Manuel*, pp 150–1.

Madras, sec. 59). Those under (*a*) relate to the survey of land; those under (*b*) to cases where witnesses require to be summoned or documents produced. Powers under (*a*) may be required when a Forest Officer is sent on survey duty, preliminary to a settlement or otherwise; those under (*b*) refer to powers which may be required in enquiries into rights in a Protected Forest,[1] or that might perhaps be conferred on an ordinary Forest Officer (of competent grade) when he is working with a Forest Settlement Officer (sec. 8) without being actually appointed Joint Settlement Officer; (in which case he would be vested with the powers of the office).

The power to issue a search warrant (*c*) relates to the detection of offences, especially those connected with concealing timber, &c., and to this I have already alluded.

Under sec. 71 (*d*) (Burma 70 (*d*); Madras 59 (*c*) ) power may be given, which is analogous to, but not at all the same as that exercised by Forest Officers under the French Code.[2]

[1] But the powers under this section do not include the decision of any dispute, or the record of anything in the nature of a judgment or order.

[2] The student will find a very clear and precise account of the Forest Officer's *procès verbal* under the French Law, in M. Puton's *Manuel* (pages 120–130). The *procès* must be (1) *written* (in the absence of express legal excuse) by the *officer himself;* must be (2) *signed* (not merely marked) by him, (3) *dated*, (4) "*affirmed*," that is stated on oath before a proper authority to be entirely true; which oath is recorded and duly signed; and it must (5) be *registered* (see Code For., 165–170). The registration is a mere fiscal act and of no real importance except as regards certain fees which may be leviable for delay. The *procès verbal* must also (Code, Inst. Crim., Art. 16) state the nature of the offence, the circumstances, the time and the place of occurrence, the proofs of it, and the local or other indications of its occurrence *e.g.*, a freshly cut stump of such and such a girth; ground disturbed, &c., &c.)

The *procès verbal* so drawn up may be of two kinds. (1) If it is prepared by *two officers concurrently*, no matter what the gravity of offence or amount of fine, &c., it is positive proof (of all *material facts* directly asserted) and cannot be contradicted, except (1) by plea of formal defect in legal requirements, and (2) by a process called "*inscription de faux*," that is by a formal plea to the Court that the *procès verbal* contains statements which are false and contrary to the facts. This issue is then solemnly tried as an incidental or side-trial by itself; if the objector succeeds, the *procès verbal* goes for nothing and cannot be amended, or supported in any way. If the objector fails, he is liable to be fined at least 300 francs and may be prosecuted for calumny, &c. The reader may think this a tremendous power to put in the hands of the officers; but it should be borne in mind, that the severity of the rule is very largely tempered by the fact that the slightest disobedience to the precise rules of preparation, is fatal; and not only so, but the proof only extends to *material* facts directly asserted, that is, (as M. Puton explains, *Manuel*, p. 125) to "those facts which fall directly within the cognizance of the senses of the deponents, and which are not matter of inference or of supposition or estimate, on their part." The result naturally is, that the *procès verbal* to be successful must be prepared with the utmost intelligence, and the most scrupulous care and accuracy; while, for anything like false or

The Forest Officer empowered, may hold a preliminary enquiry into a forest offence just as the police do, only with this important difference, that he may *record evidence;* and this, *provided it has been* taken in the *presence* of the *accused,* is admissible in a subsequent trial before a Magistrate, but may, of course, be disproved or contradicted.[1] How officers should record evidence in such cases, has been stated in the Lectures on the Criminal Procedure Law (p. 170).

The use of this power is a limited one; it is not intended to be exercised as a matter of course in every forest case; but only where the Forest Officer comes across some case in which the witnesses are at hand, and the accused is either arrested on the spot or can at once be brought there; also where the facts are such that the evidence of them is likely to disappear by lapse of time and influence of weather, &c., unless they be proved, and the record of them secured at once. It would not be applied where no offender was found, or where none could properly be brought up at or near the spot; nor would it be, where the witnesses were not on the spot or close by and could be questioned at once; in such cases a police investigation must be sought, or a complaint made to a Magistrate.

### *Conduct of Prosecutions.*

It will naturally be asked what powers Forest Officers of any grade, have, to conduct prosecutions, or to appear as

careless statement in it, the penalty is very severe, and few officers would dare to run the risk.

(2) If the *procès verbal* has been prepared only by one guard or agent, then it carries the previously described degree of authenticity only in minor cases (below a certain amount of penalty); in cases above that grade, it affords *primâ facie proof only,* which may be contradicted.

If a *procès verbal* is annulled for *defects of form* the officer may be called as a witness, but not if the *procès* is set aside on the "inscription de faux."

By the Prussian law, which is simpler (Eding, 180), "public faith" is given to a formal record of fact (like the *procès verbal*), as well as to the *valuation of damage* done, as made by the recording officer; but the record is only *primâ facie* proof till the contrary is proved. Eding justifies the force thus reasonably attached to the official act, by observing that for the management and protection of State Forests, a carefully selected service is organized, and the employés are schooled to their duty during a long course of almost military discipline and experience. Consequently the formal deposition of an enrolled and sworn Forest Officer, regarding facts which come under his official cognizance, ought justly to be allowed a special degree of weight before the public tribunals.

[1] The Madras Act (59 last clause) adds that the evidence must have been recorded as provided in the Criminal Procedure Code (secs. 355–6–7). Practically this would *always* be done in the other provinces also.

complainants in a Criminal Court, on behalf of the State, to procure a summons against an offender, and conduct the case. It is to be regretted that nothing definite is laid down about this. Most certainly Forest Officers ought to have a definite standing before the Magistrates' Courts in this respect.[1] At present everything is matter of inference, or at best of the permission of the Magistrate. A Forest Officer can take cognizance of an offence and arrest an offender and take him before a Magistrate. It follows, therefore, that he may appear on the trial (if one follows) as complainant; but to be complainant is not the same thing as being allowed to conduct the case, to examine or cross-examine witnesses, or address argument to the Court. By the Police Act, sec. 24, it is expressly provided that any Police Officer may lay information, act, investigate, and prosecute, any case before a Magistrate. By the Criminal Procedure Code, sec. 495, the Magistrate may in any trial before him (or preliminary enquiry) *permit* any person to conduct the prosecution. So the Forest Officer might get *leave* to prosecute. Government might also appoint Forest Officers "public prosecutors" for their own class of cases, under sec. 492. In any grave case the Government would appoint a public prosecutor or send a Government Advocate; but this does not remove the daily inconvenience of wanting a recognized *locus standi* for Forest Officers in the Magistrates' Courts, or the need of some section in the Forest law like the sec. 24 of the Police Act, or, better still, like the French Code.

[1] As in the French Law, Art. 159 (an addition made to the original Code in 1859), where it is expressly provided that "agents,"—that is "administrative" or controlling and executive officers of the rank of Garde Général and upwards (but not préposés, *i.e.*, guards of cantons or beats, brigades, &c.) can conduct suits and prosecutions on behalf of the Administration, both in cases of *délit and contravention* (major and minor offences) and in all cases for compensation. And here I may again refer to the distinction made by the Forest law between the *agent* and the *préposé* in the matter of criminal prosecutions: the officers who can arrest, make a seizure, or execute a search (*visite domiciliare*) and make formal "*constatation*" of what has come under their notice (and préposés can do all this) are not the officers who conduct the prosecution (*poursuite*). The "agents" can never make an arrest nor apparently a search (Puton, p. 114), nor can the préposé ever conduct a case, (id. and *Code d'Instr. Crim. Art.*, 182). The "agents," it is true, can make an official record (*constatation*) of what they see, but that is only a secondary function, because it would be inconvenient if they could not: otherwise they are kept free and impartial to prosecute, &c. They are entitled to be heard in argument (Code, For. 174) and to appeal (Code, For. 183-4). It is also conveniently provided that forest guards, though they may not prosecute, may serve and *execute Court processes* (Code, For. 173) except warrants of execution by seizure of property.

*Receipt of Revenue—Expenditure, Etc.*

Forest Officers have also certain powers in connection with collection and receipt of revenues, and expenditure of Government money.

There are departmental rules about the power to expend money provided in the divisional budget, and also rules about keeping accounts, dealing with revenue received, supplying subordinates with funds by imprest advances, and so forth, which are laid down in the Departmental Code, and which are not matters of law.

Forest Officers may also receive revenue from sales of forest produce and so forth, but they have no functions in effecting its actual recovery.[1] Generally payments are made before delivery, but where this is not so, or where otherwise there are outstandings to be recovered, all the Forest Officer has to do is to report (in a form prescribed by order) to the Collector, who can recover as if it were an arrear of land revenue (Ind. Act, sec. 81; Burma, 77; Madras, 66):—

(*a*) All money payable to Government under the Act or rules;[2]

(*b*) All money payable on account of any forest produce;

(*c*) All money as expenses incurred in the execution of the Act in respect of such produce.

In India and Burma the *penalty* on bonds can also be so recovered in certain cases (p. 400).

But a Forest Officer may so far himself act in the matter of recovering revenue that, under sec. 82 (Burma, 78; Madras, 67) if the forest produce is on the spot and money is found to be due on it,[3] the Forest Officer may detain the produce till the money is paid; and if the money is already due, or otherwise is not paid when it becomes due, the Forest Officer may sell the produce, and the sums payable to Government on account of it are first to be paid out of the proceeds before any other lien (if any) is satisfied.

[1] And so in France (Puton, *Manuel*, p. 94). The "agents" send "*titres de recouvrement*,"—lists of revenue due, to the "Director of domains," who takes steps to recover. In many cases they can be got in by summary process, as in India.

[2] Except *fines*, which are recovered under the Criminal Procedure Law.

[3] Either as the price of it, or as a charge or fee or duty leviable in respect of it.

*Duty in making Contracts.*

It will be sufficient briefly to allude to the fact that Forest Officers (but of the higher grades only) may have to "execute," in their official capacity, contracts or other legal instruments, required for Departmental work, supplies or material.

Theoretically, all such contracts are made by the Secretary of State for India in Council.[1] In 1859, the Act 22 & 23 Vict. cap. XLI. provided that in India, such contracts might be executed (on behalf of the Secretary of State) by the Governor General, or the head of the Government in any Province (Governor, Lieut.-Governor, Chief Commissioner, or Resident) and that the "execution" has to be indicated in the usual way: (*i.e.*, the Governor &c., does not sign with his own hand, but one of his Secretaries or head of a Department does,—"by order"; and the Office Seal is also usually affixed). But in all cases, the contract so executed, must express that it was done "on behalf of the Secretary of State for India in Council." The *form* of execution (which is a matter of official usage) may be varied by the Governor General (sec. 2). Under this law, the Government of India has issued Resolutions, directing what classes of Forest Officers are to be empowered by their respective Local Governments, to make contracts binding on Government.[2] The precise powers of any of the superior grades of Forest Officers, and the nature (and amount in value) of the contracts he can execute, must be gathered from the Orders in force in each Province. Unless any special order is issued to 'vary the form' of execution, every Government contract must state that is made by "so and so, Conservator of Forests (or whatever his grade), *by order* of the Lieut.-Governor (or Chief Commissioner, &c.), *on behalf* of the Secretary of State for India in Council."

Such contracts may be enforced against, or by, the Government; but "neither the Secretary of State nor any member of his Council, nor any person executing such deed, contract, or

[1] Act for the better Government of India (21 & 22 Vict. cap. 106), sec 40; which specifies contracts of purchase of land, stores, mortgages, and "any contracts whatsoever" for the purposes of Government.

[2] See Resolution, Government of India, No. 989, 23rd June 1877, and No. 23, 15th October, 1878 (Home Department). I am not aware whether any later orders have been issued.

other instrument, shall be personally liable in respect thereof." All liabilities, costs, damages, &c., are payable out of the revenues of India.

I need hardly remark that no officer would draw up any important agreement, without getting advice from the Government Legal advisers.

### (VI.)—Offences against the Authority of Public Servants.

In order that the legal powers given to Forest Officers, no less than other public servants, may be exercised to any purpose, it is obviously necessary that a corresponding liability should be imposed on private persons, in case they resist the execution of those legal powers. If Forest Officers, for example, can demand the aid of certain persons in putting out a forest fire, it must be made penal in those persons to neglect or refuse to give such aid. If a Forest Officer can arrest an offender, it is penal for the offender to resist a *primâ facie* lawful arrest.

I shall therefore, in concluding this lecture, notice the chief cases in which, as far as the Forest administration is concerned, the public officer's power is upheld by law.

These cases are almost all of them included in one chapter (X.) of the Indian Penal Code, headed "Of contempts of the lawful authority of public servants." But many of the sections in this chapter refer to Courts of Justice and judicial proceedings, and these I entirely omit. There are also a few provisions applicable to my subject which the Code gives in other parts, not in Chap. X.

Under secs. 172-3 are punishable those cases where a *legal notice, summons*, or *order*, is to be served, and the person *absconds* in order to avoid, or *resist* service. The latter sec. includes also the intentional *tearing down* of notices, &c., legally *posted*, as, *e.g.*, in cases where a summons which cannot be served personally, is attached to the door of the house where the person resides.

Under sec. 174 is punishable the intentional refusal to *attend* in obedience to a summons, order, &c., lawfully issued and served. Sec. 175 punishes a similar *refusal* to *produce documents*.

Secs. 178 79 and 180–81, refer to refusal to take oath, or answer questions, or to sign depositions and statements, and to making false statements on oath.[1]

Sec. 182 may sometimes come within the practice of a Forest Officer. Here the offence is that of a person giving *false information* to a public officer, so that the officer may *use his power* (of arrest, search, seizure, &c.) to the *injury* or *annoyance* of any person, with whom, but for the false information, the officer would never have thought of interfering.

Forest Officers have in certain cases the power to seize *property* liable to confiscation, or cattle in the act of trespassing. *Resistance to seizure* in such cases is punishable under sec. 183.

Resistance to lawful *arrest of the person* comes under sec. 224, and resistance offered to the arrest *of another person*, under sec. 225.

More directly important to Forest Officers are secs. 176 7, which punish the *intentional omission* to give *information* of a fire, a forest offence, &c., or the giving of *false information* by persons under legal obligation to give information, and of course *true* information, as far as they know (p. 430).

Sec. 187 further makes it penal to refuse, or neglect intentionally, to give *assistance* in cases (which I have before explained), in which the public servant is empowered by law to require assistance (see p. 430).

The general case of *obstruction* of a Forest Officer in the *execution of his duty*, is punishable under sec. 186.[2]

Sec. 189 punishes *threats of injury* to a public servant, with the object of inducing him to do, or forbear from doing, any official act; the threat is punishable whether it imports injury directly to the public servant, or indirectly to some one in whom the offender believes the public servant to be interested.

In another part of the Code will be found similar provisions applying to cases where the offender goes beyond *threats*, and

[1] "Oath" is spoken of, but under the "Oaths Act, No. X., of 1873," a "solemn affirmation" can also be administered, and always is, in the case of natives of the country.

[2] Section 188 can also apply to forest cases. Disobedience of an order under sec. 25 of the Forest Act, regarding carrying fire, regarding removal of obstructions in streams, orders regarding disposition of rafts in transit, or of timber in a depot, are instances of "orders lawfully promulgated" but they are better dealt with under the Forest Act, as offences against the Act or rules, as the case may be.

actually uses force, or causes hurt, or grievous hurt, in the attempt to deter the public servant from his duty. (Secs. 332, 333, and 353, Indian Penal Code.)

Sec. 184 punishes obstruction to a *lawful sale* conducted by a public servant as such: and sec. 185 refers to *illegal bids* at such auctions.[1]

These are sections which I alluded to as not contained in Chapter X. of the Penal Code, and there are a few others which may be mentioned.

Sects. 170–1 punish the personating of a public officer or wearing a garb or carrying a token similar to that used (as a matter of fact) by any class of public servants. Ill-disposed persons might resort to this device, either to escape detection in committing offences or to impose on the ignorant.

I should, perhaps, repeat under this head, that an offence is committed by *offering* a bribe to a public servant: this being an *abetment* of the offence of *taking* (p. 463).

[1] As "illegal" means not only what is punishable, but what gives rise to a civil claim, a Forest Officer who is bound by his service rules not to trade in timber, *might* come under this provision.

I may here mention that Forest Officers are sometimes much hampered in public sales by *combinations* among merchants. This, however annoying, is not criminal, nor does it come under the sections quoted. We have nothing analogous to the French law (Code Forest: Art. 22), which prohibits secret combinations, and "*manœuvres*" to spoil auctions—"*les troubler ou à obtenir les bois à plus bas prix*," &c., such acts involve penalties besides damages and the nullity of the "*adjudication*."

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